TRA

SUPREME COURT OF THE

OCTOBER TERM, 19

No. [illegible]

ROBERT E. WRIGHT, JR., AS MAYOR OF THE
DENVER, PLAINTIFF IN ERROR,

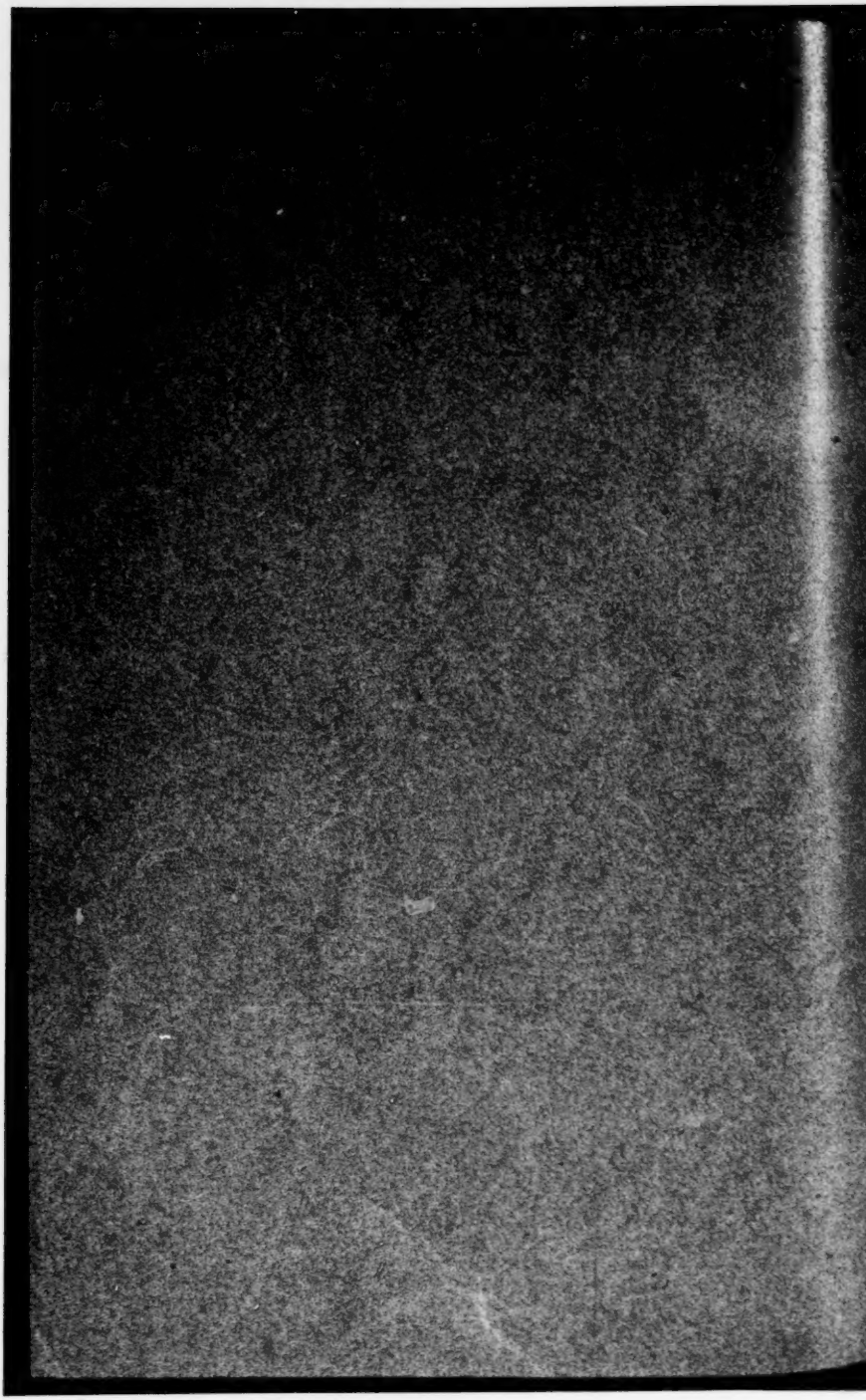
vs.

ELLEN TERESA MORGAN ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF A
FOR THE DISTRICT OF

FILED NOVEMBER 18, 1901.

(18,319.)



(18,319.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals...	*a*	1
Caption to transcript from United States circuit court.....	1	1
Transcript from district court of Arapahoe county, Colorado...	1	1
Recital as to filing of complaint.....	2	2
Complaint.....	2	2
Summons and sheriff's return.....	4	4
Demurrer of Samuel B. Morgan to complaint.....	7	7
Demurrer of Margaretta G. Rice *et al.* to complaint.....	7	8
Petition of Samuel B. Morgan for removal to Federal court.	8	9
Bond of Samuel B. Morgan for removal.....	9	10
Order of removal.....	10	11
Clerk's certificate to transcript.....	11	11
Answer of Samuel B. Morgan.....	11	12
Act of Congress of May 21, 1872	12	12
Patent, United States to Joseph E. Bates, mayor, etc., November 15, 1873.....	12	13
Petition of Joseph P. Machebeuf, Catholic bishop, to mayor and common council of Denver.....	14	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 27, 1902.

	Original.	Print
Report of committee of the council on the petition of the bishop	14	14
Report of the committee on public grounds and buildings.	15	15
Deed, city of Denver, by mayor, to Joseph P. Machebeuf, bishop, February 6, 1874.	15	15
Portions of act of Congress of 1866	17	17
Act of Congress of January 25, 1890, amending act of May 21, 1872	17	17
Demurrer to answer of Samuel B. Morgan	21	21
Order sustaining demurrer to answer of Samuel B. Morgan	23	22
Mandate of United States circuit court of appeals	23	22
Order overruling demurrer to answer of Samuel B. Morgan	25	24
Order sustaining Henry V. Johnson, mayor, as a party plaintiff in place of Platt Rogers	25	24
Replication to the amended answer of Samuel B. Morgan	25	24
Order denying motion for judgment on the pleadings	28	27
Amended replication to answer of Samuel B. Morgan	28	27
Demurrer of defendants to amended replication	31	29
Order overruling demurrer to amended replication	31	30
Stipulation that answer of Samuel B. Morgan shall stand as the answer of all the defendants, etc.	32	30
Motion to instruct jury to find for plaintiffs	32	31
Order substituting Ellen Theresa Morgan *et al.*, heirs-at-law, for Samuel B. Morgan, deceased	33	31
Verdict and order for judgment	33	32
Judgment	34	32
Order fixing amount of bond on writ of error	35	33
Assignment of errors	35	34
Bill of exceptions	37	35
Substitution of parties plaintiff and defendant	37	35
Stipulation that answer of Samuel B. Morgan shall stand as answer of all the defendants	37	35
Admission of defendants as to the mayors of Denver	38	36
Testimony for plaintiffs	38	36
Patent, United States to Joseph E. Bates, as mayor, etc., memorandum as to	38	36
Motion to instruct jury to find for defendants, and exception to ruling thereon	38	36
Testimony for defendants	39	37
Deed, city of Denver to Joseph B. Machebœuf, memorandum as to	39	37
Proceedings of city council on report of committee upon the petition of Joseph P. Machebœuf	39	37
Ruling of the court on objections to deed from city of Denver to Joseph P. Machebœuf	40	38
Deed, Joseph P. Machebœuf to Samuel B. Morgan, memorandum as to	42	39
Motions to instruct jury to find for defendants, and exception to ruling thereon	42	39
Court's instruction to the jury and exception thereto	42	40
Verdict and exception thereto	42	40
Certificate of judge to bill of exceptions	43	40
Precipe for transcript	43	40

	Original.	Print
Bond on writ of error	43	41
Writ of error and clerk's return	45	42
Citation and admission of service	47	44
Clerk's certificate to transcript	47	44
Appearance for plaintiffs in error	49	45
Appearance, Mr. Carpenter, for defendant in error	49	46
Appearance, Mr. Ellis, for defendant in error	50	46
Appearance, Mr. Herrington, for defendant in error	50	47
Order of submission	51	47
Opinion of United States circuit court of appeals	52	48
Judgment of United States circuit court of appeals	60	56
Petition for substitution of party	60	56
Order for substitution of party	62	58
Assignment of errors	62	58
Petition for writ of error	66	61
Bond on writ of error	66	61
Writ of error and clerk's return	69	63
Citation and admission of service	71	64
Clerk's certificate to transcript	72	65

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1900, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit, the third day of December, A. D. 1900, before the Honorable Henry C. Caldwell and Honorable Amos M. Thayer, circuit judges, and Honorable Elmer B. Adams, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the fifteenth day of January, A. D. 1900, a transcript of record was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, pursuant to a writ of error directed to the circuit court of the United States for the district of Colorado, in the cause wherein Ellen Teresa Morgan, *et al.*, were plaintiffs in error and Henry V. Johnson, as mayor of the city of Denver, was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 *Pleas in the Circuit Court of the United States within and for the District of Colorado, Sitting at Denver.*

Be it remembered that heretofore and on to wit: the 1st day of November, A. D. 1892, came Messrs. Benedict & Phelps, attorneys of said court and filed in said court a transcript of proceedings heretofore had in the district court of the second judicial district of the State of Colorado, sitting in and for the county of Arapahoe, in a certain cause in said district court lately pending, wherein Platt Rogers, as mayor of the city of Denver, and The City of Denver were plaintiffs, and Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, Charles L. McIntosh, trustee, James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation, Cyrus G. Richardson and Samuel B. Morgan were defendants.

And the said transcript is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of Arapahoe, }

District Court, County of Arapahoe.

Pleas in the district court of Arapahoe county, State of Colorado, in the first division thereof, before the Honorable John A. Bentley, one of the judges of the second judicial district of the said State, at a term thereof begun and held at the court-house, in Denver, in said county, on the second Tuesday (it being the 13th day) of September, A. D. one thousand eight hundred and ninety-two.

Present: Honorable John A. Bentley, one of the judges of the district court. Robert W. Steele, Esq., district attorney of said district. William K. Burchinell, Esq., sheriff of said county. Matt Adams, Esq., clerk of said court.

PLATT ROGERS, Mayor, etc., }
vs. } 17281.
CHARLES B. WOOD ET AL. }

Be it remembered, that heretofore and on to wit, the 1st
2 day of September, A. D. 1892, came the plaintiffs by F. A. Williams, Esq., their attorney and filed herein their complaint.

And said complaint is in words and figures as follows, to wit:

In the District Court of Arapahoe County, Colorado.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a Corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a Corporation; Cyrus G. Richardson, and Samuel B. Morgan, Defendants. } Complaint.

The plaintiffs complain of the defendants, and for cause of action allege:

1. That the plaintiff, Platt Rogers, is and ever since the 18th day

of April, A. D. 1891, has been the duly elected, qualified and acting mayor of the city of Denver.

2. That by virtue of an act of Congress of the United States of America, approved on the 21st day of May, A. D. 1872, patent of the United States bearing date November 15th, A. D. 1873, was duly issued, conveying to Joseph E. Bates, mayor of the city of Denver and to (*its*) successors and assigns forever, the following lands in Arapahoe county aforesaid, to wit: the northwest quarter of the southwest quarter of section one (1) the southwest quarter of the northeast quarter and the north half of the southeast quarter of section two (2) all in township four (4) south, range sixty-eight (68) west; in trust for the city of Denver; which patent was on the 26th day of March, A. D. 1875, recorded in Book 76, at page 52, of the official records, in the office of the recorder of deeds, in and for Arapahoe county, aforesaid.

3. That ever since the 15th day of November, A. D. 1873,
3 the legal title in fee-simple to said lands has been vested in the mayor of the city of Denver, in trust as aforesaid; and that said The City of Denver has during all of said time been, and now is legally entitled to occupy and possess said lands for the purposes of a city cemetery and public park.

4. But that, nevertheless, while the plaintiff, Platt Rogers, as mayor of the city of Denver, was such owner in fee-simple, and so seized of said lands and premises, and while the city of Denver was so entitled to occupy and possess said lands as aforesaid the defendants, Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, and Charles L. McIntosh, trustee, did, on the 1st day of August, A. D. 1892, enter into and upon and occupy that portion of said lands described as follows, to wit: the south half of the northeast quarter of the southeast quarter of section two (2), township four (4) south, range sixty-eight (68) west aforesaid, and ever since said date have wrongfully withheld and still withhold the possession of said premises from the plaintiffs, and exercise acts of ownership in or over the same; and that said defendants, James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation, Cyrus G. Richardson, and Samuel B. Morgan, claim some title to or interest in said premises adversely to the plaintiffs; to the damage of the plaintiffs in the sum of one thousand dollars.

Wherefore, plaintiffs pray judgment against the defendants for the recovery of the possession of said premises and for the sum of

one thousand dollars damages for withholding the possession thereof and they also pray judgment for their costs.

F. A. WILLIAMS,
Attorney for Plaintiffs.

STATE OF COLORADO, }
County of Arapahoe, } ss:

F. A. Williams, being by me first duly sworn, on oath deposes and says: I am the attorney for The City of Denver, one of the plaintiffs in the action above mentioned. I have read the foregoing complaint, and know the contents thereof and the same is true to the best of my knowledge, information and belief.

F. A. WILLIAMS.

4 Subscribed and sworn to before me this 1st day of September, 1892.

My commission expires March 16, 1896.

[SEAL.] HENRY F. JOLLY,
Notary Public.

Indorsed: 17281. In district court. Platt Rogers, mayor, *et al.*, *vs.* Charles B. Wood *et al.* Complaint. Filed in district court, Arapahoe Co., Colo., Sep. 1, 1892. Matt Adams, clerk. F. A. Williams, att'y for pl'ffs.

And thereupon, summons issued out of said court, directed to the said defendants.

And said summons, with the return of the sheriff thereon, is in words and figures as follows, to wit:

STATE OF COLORADO, *County of Arapahoe,* } ss:

In the District Court.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,

vs.

CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. N. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a Corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a Corporation; Cyrus G. Richardson, and Samuel B. Morgan, Defendants. } Summons.

The People of the State of Colorado to Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey J. Chamberlin, trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee; C. H.
5 Brierly, trustee; S. Rose, Charles L. McIntosh, trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation; Cyrus G. Richardson, and Samuel B. Morgan, the defendants above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiffs, in the district court of Arapahoe county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore

specified for the appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover possession of the south half of the northeast quarter of the southeast quarter of section two (2), township four (4) south, range sixty-eight (68) west, in said Arapahoe county, and State of Colorado, for $1,000, damages for withholding the possession thereof, and for costs, as will more fully appear from the complaint in said action, to which reference is here made, a copy of which complaint is hereto attached and herewith served.

And you are hereby notified that if you fail to appear, and to answer to the said complaint as above required, the said plaintiffs will take judgment against you according to the prayer of said complaint.

Given under my hand and the seal of said court at Denver, in said county, this 1st day of September, A. D. 1892.

[SEAL.] MATT ADAMS, *Clerk*,
By J. F. BELFORD,
Deputy Clerk.

STATE OF COLORADO, } ss:
County of Arapahoe, }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint, in the within stated action, upon the following persons and upon the following days respectively, to wit:

On September 7th, 1892, I delivered a true copy of said complaint and summons personally to each of the following-named de-
6 fendants, to wit: Silas C. Fulton, John R. Hanna, John R. Hanna, president of the City National Bank, W. H. Chamberlin, treasurer of the Chamberlin Investment Company, Julius A. Myers, Samuel B. Morgan, Robert S. Roeschlaub, Cyrus G. Richardson, Margaretta G. Rice, Clara N. Bristol, S. Rose, and W. R. Mygatt, in the county of Arapahoe and State of Colorado.

On the 8th day of September, 1892, I served a true copy of said complaint and summons upon each of the following defendants in person, in said county and State, namely, Frederick J. Chamberlin and Charles H. Brierly.

On the 8th day of September, 1892, I served a true copy of said complaint and summons personally on each of the following-named persons, who accepted service for each of the following-named defendants, respectively, to wit: To W. R. Mygatt for Charles L. McIntosh; to Julius A. Myers for Horace W. Bennett; to Frederick J. Chamberlain for H. B. Chamberlin and Alfred H. Chamberlin; to Frederick J. Chamberlin for James Nichols and James H. Williams; to C. H. Brierly for Henry Hislop and William Sumner; and to J. B. Church for William Church.

On the 8th day of September, 1892, I served a true copy of said complaint and summons upon the defendant, Robert C. Fisher by delivering a true copy of said complaint and summons to Martha Miles Fisher, wife of said Robert C. Fisher, a member of his family

over the age of fifteen years, at his usual place of abode and place of residence, in said county and State.

After diligent search I am unable to find the following-named defendants, namely: Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, James Pickard, H. H. Bryant, J. M. Chapman, James A. Skinner, Frank E. Harrington, Mary C. Rockwell, A. S. Weston, and Jennie C. B. Reynolds, and as to said last-named defendants I now return this summons *non est inventus*, this 16th day of September, A. D. 1892.

W. K. BURCHINELL, *Sheriff*,
By W. F. M. LYON, *Deputy*.

Sheriff's Fees.

Service..... $
Mileage.....
Return.....

Total ..... $

Filed this 16th day of September, A. D. 1892.

Indorsed: No. 17281. Summons and complaint. Platt Rogers, as mayor of the city of Denver and The City of Denver, pl'ffs, 7 *vs.* Charles B. Wood *et al.*, def'ts. State of Colorado, county of Arapahoe—*ss.* Office of the sheriff of said county, Sept. 3rd, A. D. 189–. I hereby certify that I received the within summons on the 3rd day of September, 1892, at — o'clock p. m. W. K. Burchinell, sheriff, by W. F. M. Lyon, deputy. Filed in district court, Arapahoe Co., Colo., Sep. 19, 1892. Matt Adams, clerk. F. A. Williams, attorney for pl'ffs.

And afterwards, and on to wit: the 27th day of September, A. D. 1892, came defendant Samuel B. Morgan, by Messrs. Teller, Orahood & Morgan, and filed herein his demurrer to the plaintiffs' complaint.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, } *ss*:
County of Arapahoe, }

In the District Court.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Plaintiffs, *vs.* CHARLES B. WOOD ET AL., Defendants. } No. 17281. Div. I.

Demurrer to Complaint.

Now comes Samuel B. Morgan, one of the defendants in the above-entitled action, and demurs to the plaintiffs' complaint herein, and for cause of such demurrer, alleges that the said complaint does

not state facts sufficient to constitute a cause of action against this defendant.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant Samuel B. Morgan.

Indorsed: No. 17281 div. 1, dist. court. Platt Rogers, mayor etc., *vs.* Chas. B. Wood *et al.* Demurrer Sam'l B. Morgan to complaint. Filed in district court, Arapahoe Co., Colo., Sep. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for Sam'l B. Morgan.

And afterwards, and on to wit, the 27th day of September A. D. 1892, came defendants Margaretta G. Rice, C. G. Richardson and John R. Hanna, trustee, by Charles H. Burton, their attorney, and filed herein their demurrer to plaintiffs' complaint.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court of said County.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD ET AL., Defendants.
} Demurrer.

Come now the defendants, Margaretta G. Rice, Cyrus G. Richardson and John R. Hanna, trustee, by their attorney Charles H.
8 Burton, and demur to the complaint of the plaintiffs, in the above-entitled action, for and upon the following grounds and reasons, to wit:

First. That there is a misjoinder of parties plaintiff in this, that it appears from said complaint that the plaintiffs have no joint legal estate right, title or interest in or to the premises mentioned and described in said complaint also in this, that it appears from said complaint that the plaintiff, Platt Rogers, as mayor of the city of Denver, has no right, title or interest in or to said premises.

Second. That the plaintiff, Platt Rogers, as mayor of the city of Denver, has no legal capacity to sue.

Third. That said complaint does not state facts sufficient to constitute a cause of action against the defendants Rice, Richardson and Hanna, or against any of them, or either one of them, in favor of the plaintiffs.

CHARLES H. BURTON,
Att'y for Def'ts Rice, Richardson, and Hanna.

Indorsed: No. 17281. Platt Rogers, as mayor of the city of Denver, *et al. vs.* Charles B. Wood *et al.* Demurrer of Rice, Richardson & Hanna. Filed in district court, Arapahoe county, Colo., Sep. 27, 1892. Matt Adams, clerk. Chas. H. Burton, att'y for def'ts Rice Richardson and Hanna.

And afterwards, and on to wit, the 27th day of September A. D. 1892, came the petitioner by Messrs. Teller, Orahood & Morgan his attorneys and filed herein his petition and bond for removal of this cause to the United States court.

And said petition is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of Arapahoe. }

In the District — of Arapahoe County.

PLATT ROGERS, as Mayor of the City of Denver, Plaintiff, }
vs.
SAMUEL B. MORGAN ET AL., Defendants. }

Petition to Remove This Case to the United States Circuit Court.

To the honorable the district court of Arapahoe county, State of Colorado:

Your petitioner, Samuel B. Morgan, respectfully shows that he is one of the defendants, in the above-entitled suit, that the matter in dispute thereof exceeds, exclusive of interest and costs, the sum of two thousand dollars.

Your petitioner further shows that said suit is of a civil
9 nature for the recovery of certain real estate in the city of Denver and for one thousand dollars damages alleged to have accrued by reason of the detention of the same.

And your petitioner further shows that in the said above-mentioned suit, there is a controversy involving the construction of a statute of the United States, to wit, an act entitled An act to enable the city of Denver to purchase certain land in Colorado for a cemetery approved May 21, 1872.

And your petitioner offers herewith a bond with good and sufficient surety in the penal sum of five hundred dollars, conditioned for his entering in the circuit court of the United States for the — district of Colorado on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make an order of removal as required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States within and for the — district of Colorado, according to the statute in such case made and provided.

And your petitioner will ever pray etc.

S. B. MORGAN,
By his att'y-in-fact, E. B. MORGAN.
TELLER, ORAHOOD & MORGAN,
Attorneys for Petitioner.

Indorsed: Gen. No. 17281. Term No. —. District court of Arapahoe county. Platt Rogers as mayor *et al. vs.* Chas. B. Wood *et al.* Petition for removal of cause under act of 1887, between citizens of different States. Filed in district court, Arapahoe Co., Colo., Sep. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for petitioner.

And said bond is in words and figures as follows, to wit:

Know all men by these presents, that we, Samuel B. Morgan, of the city of Denver, county of Arapahoe, State of Colorado as principal and Edward B. Morgan and Willard Teller of the city of Denver in the county of Arapahoe and State of Colorado as surety, are held and firmly bound unto Platt Rogers as mayor of city of Denver and the City of Denver and all other persons whom it may concern, in the penal sum of five hundred dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

10 Whereas, Samuel B. Morgan principal above named, has petitioned the district court of Arapahoe county, in the State of Colorado, for the removal of a certain suit therein pending, wherein Platt Rogers, as mayor of the city of Denver and The City of Denver *is* plaintiff- and the said Samuel B. Morgan is one of the defendants into the circuit court of the United States for the — district of Colorado.

Now therefore, the condition of this obligation is such that if the above-bounden Samuel B. Morgan shall enter in such circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in said cause if special bail was originally required therein and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void, otherwise of force.

Witness, our hands and seals, this 27th day of Sept. 1892.

SAMUEL B. MORGAN,
By E. B. MORGAN, [SEAL.]
Att'y-in-fact.
WILLARD TELLER. [SEAL.]
EDWARD B. MORGAN.

Indorsed: Gen. No. 17281. Term No. —. District court of Arapahoe county. Platt Rogers as mayor, *et al. vs.* Chas. B. Wood *et al.* Removal of cause—Bond. Filed in district court, Arapahoe Co., Colo., Sept. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for petitioner.

And afterwards, and on to wit, the 22nd day of October, A. D. 1892, the same being one of the regular juridical days of the September term, 1892, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

PLATT ROGERS, Mayor, etc., *vs.* CHARLES B. WOOD ET AL. } 17281. Ejectment.

At this day come the said defendants by their attorney E. M. Morgan, Esq., and the said defendants having heretofore presented and filed their petition for the removal of this cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed their bond for such removal and the court having considered the same,

11 It is ordered by the court that the said petition and bond be and they are hereby approved, and that this action be and the same hereby is removed to the said circuit court and let the clerk of this court make a transcript of the papers in this behalf together with all orders had and entered of record herein and certify the same to said circuit court of the United States for the district of Colorado, with all convenient speed upon the payment of all costs remaining due in this action.

STATE OF COLORADO, *County of Arapahoe,* } *ss:*

I, Matt Adams, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of complaint, summons, demurrers of defendants, petition and bond for removal and order of court, had and entered of record in a certain cause in said court lately depending wherein Platt Rogers, as mayor and City of Denver were plaintiffs, and Charles B. Wood *et al.* were defendants, as the same now remains on file and of record in this office.

Witness my hand and seal of said court, at the court-house in Denver, county and State aforesaid, this 27th day of October, A. D. 1892.

[SEAL.]

MATT ADAMS, *Clerk*,
By G. S. RICHARDS,
Deputy Clerk.

Indorsed: 2854. U. S. circuit court. Platt Rogers, mayor, *et al.*, *vs.* Charles B. Wood *et al.* Transcript. Filed Nov. 1, 1892. Robert Bailey, clerk. Teller, Orahood & Morgan, def'ts' att'ys.

In the Circuit Court of the United States, District of Colorado.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Complainants,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

The said defendant Samuel B. Morgan, answering the complaint of the plaintiffs herein admits that said plaintiff was at the time of the commencement of this suit the mayor of the city of Denver as in said complaint set forth.

Second. Admits that by virtue of an act of Congress, approved on the 21 day of May, 1872, a patent of the United States, bearing date the 15th day of November, 1873, was duly issued, conveying to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, the lands described in the complaint herein, and admits that the said patent was recorded on the 26th
12 day of March, 1875, in Book 72, at page 52, of the records of deeds of Arapahoe county aforesaid.

Third. Admits that from the 15th day of November, 1873, and until some time thereafter, to wit: until the same was conveyed away by deed, the legal title in fee-simple to said lands was vested in the mayor of the city of Denver; denies that it was in trust, as set forth in the complaint, and denies that the City of Denver is now legally entitled to occupy and possess the said lands for the purposes of a city cemetery and public park or either of them.

Fourth. This defendant, further answering, admits that the said defendants in said complaint mentioned did before and at the time mentioned in said complaint enter into and occupy that portion of the said lands in said complaint described, to wit: the south half of the northeast quarter, the southeast quarter of section 2, township four, south of range sixty-eight west, and admits that they do still withhold the possession of said premises from the said plaintiff; and admits that the said defendant, Samuel B. Morgan, claims title and interest in the said premises adversely to the plaintiff, as hereinafter set forth.

And this defendant, further answering says, that on the 21st day of May, 1872, the Congress of the United States passed an act entitled, "An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes;" which said act was in the words and figures following:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That the mayor of the city of Denver, Colorado Territory be and he is hereby authorized to enter through the proper land office at the minimum price per acre the following lands belonging to the United States, to wit: the northwest quarter of the southeast quarter of section number one, and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section number two, in township number four south, in range number sixty-eight west of the sixth principal meridian, in the Territory of Colorado, being 160 acres of land, lying adjacent to the city of Den-

ver, to be held and used as a burial place for the said city and vicinity.

Approved May 21, 1872."

And that a patent was issued by the Government of the United States to Joseph E. Bates, mayor of the city of Denver, which said patent was in the words and figures following:

"To all to whom these presents shall come, Greeting:

Certificate No. 2044. Whereas Joseph E. Bates, mayor, in trust for the city of Denver, C. T., has deposited in the General
13 Land Office of the U. S. a certificate of the register of said office at Denver city C. T., whereby it appears that full payment has been made by said Bates, mayor in trust for the city of Denver, according to the provisions of the act of Congress of the 24th of April, 1820, entitled An act making further provision for the sale of the public lands for the N. W. ¼, S. W. ¼, sec. 1; the S. W. ¼, N. E. ¼, and the N. ½ S. E. ¼ sec. 2, tp. 4, S. R. 68, W., in the district of lands subject to sale at Denver city, C. T. containing 160 acres according to the official plat of the survey of the said lands returned to the Gen. Land Office by the surveyor general, which said tracts have been purchased by the said Bates mayor in trust for said city.

Know ye that the U. S. A. in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted and by these presents do give and grant unto the said Bates, mayor in trust for said city and to his successors the said tracts above described, to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto said Bates, mayor in trust for the city of Denver, and to his successors and assigns forever, subject to any vested and accrued water rights for mining, agricultural or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local custom-, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

In testimony whereof, I, U. S. Grant, President U. S. A. have caused these letters to be made patent and the seal of the Gen. Land Office to be hereunto affixed. Given under my hand at the city of Washington, the 15th day of November, 1873, and of the Independence of the U. S. the 98th.

By the President:

[SEAL U. S.]

U. S. GRANT,
By Z. B. STURGES, *Ass't Sect.*

Rec. vol. 4, page 329.

L. K. LIPPINCOTT,
Rec. Gen. L. Office."

That immediately after the obtainment of said patent, and on or about the 28th day of October, 1872, Joseph P. Machebeuf, who was

then the bishop of the Catholic church for the diocese of Den-
14 ver, filed a petition to the honorable the mayor and the common council of the city of Denver; which said petition was in the words and figures following, to wit:

"To the honorable the mayor and common council of the city of Denver:

Your petitioner Joseph P. Machebeuf, Catholic bishop of Denver, respectfully represents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe county, that some time in the year 1863 he purchased for the sum of $200 from one John I. Walley, the following-described piece of land situate in said county of Arapahoe, viz., the N. E. ¼ of the S. E. ¼ of sec. 2, T. 4, S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe county as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and (interefered) with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of said city of Denver by whomsoever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray etc.

JOSEPH P. MACHEBEUF,
Bishop of Denver,
By EDWARD L. JOHNSON,
His Att'y-in-fact.

Denver, Oct. 28, 1872."

That such proceedings were afterwards had on said petition, that on the 4th day of December, 1873, the committee which had been appointed for that purpose reported to the said common council of the city of Denver and to the mayor thereof in the words and figures following:

"To the honorable mayor and council:

Your committee find on examination that within parties had rights previous to the city and would recommend that the
15 prayer of the petitioner be granted and the mayor in behalf of the city of Denver is authorized to make them their deed

provided they pay into the city treasury the cost of the land and which means all actual (—) which the city of Denver has been to in obtaining Government title, all of which is respectfully submitted.

M. D. CLIFFORD.
A. McNAMEE.
A. WOEBER.

Denver, C. T., Dec. 4th, 1873."

That afterwards, and on the 8 day of January, 1874, the committee of public grounds and buildings for the city of Denver, to whom said petition had been referred, reported in the words following:

The committee on public grounds and buildings with the city attorney, to whom was referred the petition of the Rt. Rev. Jos. P. Machebeuf, bishop of the Roman Catholic church of colorado, submitted the following report:

DENVER, C. T., *Jan.* 8, 1874.

To the hon. mayor and city council of the city of Denver:

Your committee would report that they have examined the foregoing petition and would recommend that the prayer of the petitioner be granted.

J. M. BROADWELL,
J. W. BARKER,
M. BENEDICT, *Committee.*

That in pursuance of said recommendation and vote of said city council of the city of Denver the mayor thereof did on the 6 day of February 1874, (made,) execute and deliver to said Joseph Machebeuf, as aforesaid a deed to said property, which is in the words following:

"This deed made this sixth day of February in the year of our Lord one thousand eight hundred and seventy-four between the City of Denver by Francis M. Case, its mayor, of the county of Arapahoe and Territory of Colorado, of the first part, and the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, of the county of Arapahoe, Territory of Colorado of the second part, witnesseth that the said party of the first part for and in consideration of the sum of fifty dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised released sold conveyed and quitclaimed and by these presents do- remise, sell, convey and quitclaim unto the said parties of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which
16 the said first party has in and to the following-described real estate situate, lying and being in the county of Arapahoe and Territory of Colorado, to wit, the northeast one-fourth of the southeast one-fourth of section two, township four, south of range sixty-eight west. This deed is made by order of the city council of the city of Denver.

To (*hand*) and to hold the same together with all and singular the appurtenances and privileges thereto belonging or in anywise thereto appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part either in law or equity to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever, for the purposes aforesaid.

In witness whereof the said party of the first part, by Frances M. Case its mayor, has hereunto set (*his*) hand and seal the day and year above written.

THE CITY OF DENVER, [SEAL.]
By FRANCES M. CASE,
Mayor of Denver.

Signed, sealed and delivered in presence of—
—— ——.

The erasure in the description and trustee was made before execution.

—— ——, *City Clerk.* [CITY SEAL.]

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, Mitchell Benedict, a notary public in and for said county in the Territory aforesaid do hereby certify that Frances M. Case, mayor of said city of Denver, who is personally known to me as the person whose name is subscribed to the annexed deed appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this sixth day of February, A. D. 1874.

MITCHELL BENEDICT,
[NOTARIAL SEAL.] *Notary Public.*"

That said deed was thereupon delivered to the said Machebeuf and was afterwards, on to wit, the 7 day of February, 1874, recorded in the records of Arapahoe county, State (then Territory) of Colorado, and the said Machebeuf, being then in the possession of said property, and having been in the possession thereof since the date mentioned in his said petition, and before that time, continued in the possession thereof and that said ground was used as a place of burial for members of the Catholic church from that time up until some time about the year 1887, such burials having all been made in the north half of said tract, when on account of the proximity
17 of said burial place to the residence portion of the city of Denver, the subject of burials in that place became a matter of public discussion in the newspapers and elsewhere, the newspapers and others interested in the health of the city insisting that the time had come when burials at that place should be discontinued, and they were discontinued; and subsequently by resolution

of the board of health, a department of the city council, burials in said grounds were prohibited; said resolution bearing date August —, 1892.

That, by the laws of its organization as it existed in 1873, it was provided by section third of the act of 1866 as follows:

Whenever any tract of land adjoining the city of Denver shall be laid off into town lots, platted and duly recorded, as may be required by law, the same shall be annexed to and become a part of the city of Denver.

SECTION FOUR. The inhabitants of the said city, by the name and style aforesaid through and by the said city council, shall have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and for other public purposes, and shall have power and authority to sell and convey the same; and may also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same.

SECTION FIVE. The inhabitants of said city, by the name and style aforesaid, shall have power and authority, and they are hereby empowered and authorized to take and hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise; and they shall have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city.

And this defendant further shows that after the acquisition of title to the above-described land by Samuel B. Morgan, the Congress of the United States did on the 25 day of January, 1890, pass an act in the words and figures following, to wit:

"A bill to amend an act to enable the city of Denver to purchase certain land for cemetery purposes.

Whereas, at the second session of the Forty-second Congress an act approved May 21st, 1872 (17th Stat. at Large, page 140) entitled

'An act to enable the city of Denver to purchase certain lands
18 in Colorado for a cemetery' erroneously described a tract of land as the northwest quarter of the southwest quarter of section one and the north half of the southeast quarter of section two, and the southwest quarter of the southeast quarter of section two, township four south, range sixty-eight west, sixth principal meridian; and

Whereas the city of Denver has paid for and received a patent for the northwest quarter of the southwest quarter of section one and the north half of the southeast quarter of section two, township four south, range 68 west 6th P. M., which latter is correct and in accordance with the land actually occupied by the said city of Denver for a cemetery.

Therefore be it enacted by the Senate and House of Representatives of the U. S. A. in Congress assembled:

That an act entitled 'An act to enable the city of Denver to pur-

chase certain lands for a cemetery' approved May 21, 1872, be and the same is hereby amended as follows, strike out the words 'the southwest quarter of the southeast quarter' and insert in lieu thereof the words 'the southwest quarter of the northeast quarter' so that the description of the said land in the said act shall read 'the N. W. ¼ of the S. W. ¼ of sec. 1 and the N. ½ of the S. E. ¼ of sec. 2 and the S. W. ¼ of the N. E. ¼ of sec. 2, T. 4, S. R. 68 W., 6th P. M.'

SEC. 2. That the U. S. patent issued Nov. 15, 1873, conveying the N. W. ¼ of the S. W. ¼ sec. 1, and the S. W. ¼ of the N. E. ¼ sec. 2, and the N. ½ of the S. E. ¼ of sec. 2, tp. 4, S. R. 68, W., 6th P. M., in the Territory of Colorado, to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be and the same is hereby approved and confirmed. That the said city of Denver be, and it is hereby authorized to vacate the use of the said land or any portion thereof as a cemetery, and to appropriate the use of the same for a public park or grounds, and to no other purpose."

That afterwards, and on the 25th day of April, 1887, the said Machebueg made, executed, acknowledged and delivered to the said Samuel B. Morgan the property mentioned in said complaint, to wit: the south half of the northwest quarter of the southeast quarter of section two, township four, south of range sixty-eight west, in the county and State aforesaid, the said Morgan then and there paying the said Machebeuf as the purchase price of said property the sum of twenty thousand dollars. That before said time, and on, to wit: the 31st day of March, 1885, the said Machebeuf had sold and conveyed to the Colorado Catholic Loan & Trust Association the said property described in the said patent from the Government to said city of Denver, to wit: that portion which included and covered the ground mentioned in said complaint. That the said Samuel
19 B. Morgan did, for the purpose of perfecting said title to said property, procure from said The Colorado Catholic Loan & Trust Association, to whom the property had been conveyed as aforesaid, on the 2nd day of May, 1887, a deed to the said property, to wit: said property described in said complaint. That thereupon, to wit: on the said 2nd day of May, 1887, said Samuel B. Morgan did enter upon and take possession of said property under his said deed from said Machebeuf and the said The Colorado Loan & Trust Association, and did proceed at once under claim and color of title derived from said deeds to lay out and subdivide said lands and plat said lands as an addition to the city of Denver in accordance with the laws in such cases made and provided, and did then and there while in the peaceable and undisputed possession of said lands, make a survey and plat thereof, and platted and subdivided the same into lots and blocks, with streets and alleys, platting the same as Morgan's Capitol Hill subdivision, and did then and there file the said map or plat in the office of the clerk and recorder of Arapahoe county, dedicating the said streets and alleys of the said subdivision to the public, such streets, alleys and blocks in said subdivision being by him marked and designated and marked upon the ground at the time of the filing of the map thereof, to wit:

on the 10th day of June, 1887. That thereupon, he (the said Morgan) did proceed to sell and convey portions of said lands in controversy, to wit: a large number of lots to different parties named as his codefendants in said complaint and all of the said defendants herein claimed by, through or under the said defendant Morgan, by virtue of said conveyance by the said Machebeuf and the Colorado Catholic Loan and Trust Association, and have acquired color of title under said deeds and under said deed of this defendant.

This defendant further shows, that during all of said period since the 10th day of June, 1887, up to the time of the commencement of this suit, to wit: September 1, 1892, the said city of Denver and the said county of Arapahoe did cause to be levied upon said lots and all of them contained in said subdivision, to wit: the lands described in said complaint, being the ones deeded to the said Morgan taxes for each and every year to wit: for the taxes of 1888, 1889, 1890, and 1891, which said taxes amounted to the sums following, to wit: for the year 1888, $607.39; for the year 1889, $597.11; for the year 1890, $600.56, and for the year 1891, $682.15, all of which said sums were paid by the said Samuel B. Morgan because of his alleged ownership of said property.

This defendant further shows, that in the year 1892, the said city of Denver refused to allow any taxes to be levied on said
20 property, and that as this defendant avers and believes, said failure and neglect to levy taxes for said year was because the city of Denver feared that by so doing the title to said lands would become complete and perfect in said Samuel B. Morgan under the laws of the State of Colorado, at that time and now existing.

This defendant says that he has been at all times ready and willing to pay in full the taxes for said year 1892, and for all subsequent years so far as he has remained the owner of said property; and this defendant avers that by reason of said fact and under and in pursuance of the laws of the State of Colorado, having paid all the taxes which were assessed against the property for the period of five years, and being then in the possession of said property under and by virtue of color of title of record in said county, said plaintiff is estopped from asserting any claim or title to said property, and this defendant, his codefendant, ought to be held and adjudged the legal owner of that portion of said property in controversy, to wit: the property for which this action is brought.

This defendant, further answering, says: *actio non*, because he says that at and prior to the 10th day of June, 1887, and ever since then, the said Samuel B. Morgan had to all of said property mentioned in said complaint color of title, which color of title was made in good faith to said tract, the same being then vacant and unoccupied land, he, the said Morgan, having on said last-mentioned date mapped, surveyed, platted and laid out the said tract of land in lots and blocks with streets and alleys subdividing the same, under the name of Morgan's Capitol Hill subdivision to the city of Denver, the streets and alleys being dedicated by said plat to the public, and that he, said Morgan, had held such title to said property for more

than five years before the commencement of this suit and had paid all taxes which had been assessed against said land during said five or for any other years (*years*), and had paid upon said lands by way of taxes the sum of $607.39 for the year 1888; the sum of $597.11 for the year 1899; the sum of $600.56 for the year 1890, and the sum of $682.15 for the year 1891, and that he had during all that time held said property by virtue of the deeds of the said Joseph P. Machebeuf and the Colorado Catholic Loan & Trust Association as described and set forth in the former answer of said defendants, said deeds being recorded in the office of the recorder of deeds of Arapahoe county, and by the possession of the said Morgan during all that time, to wit: from the 25th day of April, 1887, up until the 2nd day of September, 1892, and up until this time, through his grantees has been in the actual occupation and possession of
21 said property which occupation and possession were well known to the said city of Denver, and without let or hindrance on the part of the said city of Denver, and without any notice of any claim on the part of said city, and until the commencement of this suit, to wit, the 2nd day of September, 1892, and with full knowledge of said city of his claim in the said deed.

Wherefore this defendant and his grantees are entitled to be held and adjudged the legal owners of said premises in pursuance of the statutes in such case made and provided, and the said city of Denver is and ought to be estopped from asserting any claim, right or title to the said property.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant, Samuel B. Morgan.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Samuel B. Morgan, being first duly sworn on his oath says: That he is the defendant making the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

SAMUEL B. MORGAN.

Subscribed and sworn to before me this 14 day of January, 1896.

[SEAL.] CHARLES M. SPERRY,
Notary Public.

My commission expires January 21, 1897.

Indorsed: No. 2854. Circuit court. Platt Rogers, mayor etc., *vs.* Charles B. Wood *et al.* Amended answer, Samuel B. Morgan. Filed Jan. 21, 1896. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for S. B. M.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Complainants,
vs.
CHARLES L. WOOD, SAMUEL B. MORGAN, *et al.*, Defendants.
} No. 2854. Demurrer.

Comes now the complainants by F. A. Williams and G. Q. Richmond, their attorneys, and demurs to the answer of Samuel B. Morgan last filed herein, and for cause of demurrer says, that
22 the same is insufficient as an answer to the complaint for the following reasons:

I.

Because it does not appear from said answer that the defendant Morgan ever acquired legal title to the premises in controversy.

II.

Because it does not appear from said answer that the complainant or any of his predecessors or successors in office ever parted with the title to the premises in controversy.

III.

Because it does not appear from the said answer that the complainant or any of his predecessors in office had any legal right, authority or power, to convey the premises in controversy in the manner and form and by the various conveyances as alleged in said answer.

IV.

Because the conveyances in said answer relied upon to show title were not the conveyances of the complainant or any of his predecessors in office.

V.

That the acts and things set forth in said answer as constituting an alleged estoppel against the complainant were not the acts of the complainant or any of his predecessors in office.

VI.

That from all the allegations in said answer contained, it does not appear that the said defendant has ever acquired any right, title or color of title on account and by virtue of the payment of taxes on the premises in controversy.

VII.

That the said allegation- of the payment of taxes are wholly in-

sufficient in law as a defense to the matters and things alleged in the complaint.

F. A. WILLIAMS,
G. Q. RICHMOND,
Attorneys for the Complainant-.

Indorsed: No. 2854. In the U. S. circuit court, district of Colorado. Platt Rogers, mayor, etc., *vs.* Charles B. Wood *et al.* Demurrer to amended answer of Morgan. Filed Jan. 21, 1896. Robert Bailey, clerk. F. A. Williams and G. Q. Richmond, attorneys for complainant-.

23 Sixty-second Day, November Term, Tuesday, January 21st, A. D. 1896.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 5th day of November, 1895.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by George Q. Richmond Esq., his attorney, and the defendant S. B. Morgan by Willard Teller, Esq., his attorney, also comes.

And the demurrer of the plaintiff to the amended answer of the defendant S. B. Morgan, coming on now to be heard is submitted to the court and the court being now fully advised in the premises, it seemeth to the court now here that the said answer is not sufficient in law and so the said demurrer is sustained.

Wherefore, it is considered by the court that judgment be entered herein in favor of the plaintiff and against the defendant Samuel B. Morgan, for the possession of the premises in the complaint described and the said plaintiff's costs to be taxed.

UNITED STATES OF AMERICA, *ss:*

Seal United States Circuit Court of Appeals.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Whereas, lately in the circuit court of the United States for the district of Colorado, before you, or some of you, in a cause between Platt Rogers, as mayor of the city of Denver, and The City of Denver, plaintiffs, and Charles B. Wood, Samuel B. Morgan, and others, defendants, wherein the judgment of the said circuit court, in said cause, entered on the 21st day of January, A. D. 1896, is in the following words, viz:

"On this 21st day of January, A. D. 1896, the same being one of the regular juridical days of the November term, A. D. 1895, of this

court, there being present the Honorable Moses Hallett, district judge,

It is considered by the court that the plaintiff do have and recover of and from the defendant possession of the property, lands and tenements in its complaint mentioned, described as follows, to wit, the south half of the northeast quarter of the southeast
24 quarter of section two (2) township four (4) south range sixty-eight (68) west in Arapahoe county, State of Colorado, and that it have a writ of possession therefor.

It is further considered by the court that the plaintiff do have and recover of and from the defendant Samuel B. Morgan its costs by it in this behalf laid out and expended to be taxed and have execution therefor."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the eighth circuit by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came on to be heard before the said United States circuit court of appeals, on the transcript of record from said circuit court, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed with costs; and that Samuel B. Morgan have and recover against Platt Rogers, as mayor of the city of Denver, and The City of Denver, the sum of one hundred three and 60/100 dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said circuit court with directions for further proceedings therein.

MARCH 1, 1897.

You therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Indorsed: 2854. United States circuit court of appeals. No. 839, December term, 1896. Samuel B. Morgan, plaintiff in error, *vs.* Platt Rogers, as mayor, etc., *et al.* Mandate. Filed May 17, 1897. Robert Bailey, clerk.

25 Tenth Day, May Term, Monday, May 15th, A. D. 1899.

Present: The Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, and other officers as noted on the second instant.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants Ellen Theresa Morgan *et al.* by Willard Teller, Esq., their attorney also come.

And thereupon, on motion of Willard Teller, Esquire, attorney for defendants and pursuant to a mandate from the United States circuit court of appeals for the eighth circuit, it is ordered by the court that the demurrer to the amended answer of the defendant Samuel B. Morgan be and the same is hereby overruled.

It is further ordered by the court that the plaintiff reply to said amended answer within fifteen (15) days from this day.

26th Day, Saturday, June 3d, A. D. 1899.

Present: The Honorable Moses Hallett, district judge and other officers as noted on the second day of May last past.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854

Action for possession of specific real property and damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and thereupon on his motion, it is ordered by the court that Henry V. Johnson, mayor of the city of Denver, be and he is hereby substituted as plaintiff in this cause, in the place of Platt Rogers, mayor of the city of Denver.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado,

In the Circuit Court of the United States in and for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

Replication to Amended Answer.

Now come the plaintiffs, and for replication to the amended answer of the defendant, Samuel B. Morgan,

26 Deny that the supposed deed of the city of Denver, by Francis M. Case, its mayor, of date February 6th, 1874, in said

amended answer set up, was made or executed or delivered to Joseph P. Machebeuf, the grantee named in said supposed deed, in pursuance of or in conformity to the recommendation or the vote of the city council of the city of Denver.

As to whether the defendant, Samuel B. Morgan, paid to the said Joseph P. Machebeuf as the purchase price of the property for the recovery of which this action is brought, the sum of twenty thousand dollars ($20,000.00), or any other sum of money, the plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that at the date of said supposed payment, to wit: April 25th, A. D. 1877, or at any time the said Joseph P. Machebeuf, or the said The Colorado Catholic Loan and Trust Association, had any title whatsoever in said real property to convey to said Samuel B. Morgan.

As to whether or not said Samuel B. Morgan entered upon or into the possession of said real property under his said supposed deed from said Machebeuf, or the said supposed deed from the Colorado Catholic Loan & Trust Association, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs admit that on the 10th day of June, A. D. 1887, the said Morgan filed a plat or map of said realty in the office of the clerk of Arapahoe county, Colorado, as alleged in said amended answer, but they deny that under or by virtue of said deeds from said Machebeuf or said Colorado Catholic Loan and Trust Association or either of them, the said Morgan acquired any color of title to the lands in controversy herein.

Plaintiffs deny that at any time between the 10th day of June, A. D. 1887, and the bringing of this action, or at any other time, the city of Denver caused to be levied upon said lots in said amended answer mentioned, or upon any of them, taxes for the years A. D. 1888, 1889, 1890 or 1891, or for either of said years, or that said city of Denver has ever at any time caused to be levied upon said lots or any of them any taxes whatsoever.

As to whether or not the said Samuel B. Morgan, because of his alleged ownership of said property, or for any other reason paid the several sums in said amended answer mentioned as having been paid as taxes, for the respective years last hereinbefore mentioned, these plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

27 Plaintiffs deny that in the year A. D. 1892, the city of Denver refused to allow any taxes to be levied on said property in controversy, or that any action whatever was taken by said city in respect to the levy of such taxes.

As to whether or not the said Samuel B. Morgan has been at all times, or at any time, ready or willing to pay in full the taxes upon said real property for the year A. D. 1892, and for subsequent years, or for any year, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that by reason of any of the matters or things in

said amended answer set up, the plaintiffs or either of them are estopped from asserting claim and title to said real property; and deny that by reason of any of the matters or things in said amended answer alleged, the defendant, Samuel B. Morgan, or his codefendants ought to be adjudged the legal owners of the real property in controversy herein. Deny that said Samuel B. Morgan, or his codefendants, or any of them, were at any time, or at the time of the beginning of this action, in possession of said property or any part thereof, in good faith, under and by virtue of color of title.

Plaintiffs deny that the supposed color of title of the defendant, Samuel B. Morgan, in said amended answer asserted and claimed, was made in good faith; and deny that said Morgan or any of his codefendants was or were in possession of said land for a period of five years subsequent to the first supposed payment of taxes thereon, until the beginning of this action. Deny that by reason of any of the matters or things in said amended answer asserted and claimed or set up the said Samuel B. Morgan or his grantees, or any of them, ought to be held or adjudged the legal owners of said premises or any part thereof, or that said plaintiffs or either of them is or ought to be estopped from asserting claim and title to said premises.

Wherefore, plaintiffs demand judgment as they have heretofore demanded in their complaint herein.

J. M. ELLIS.
S. L. CARPENTER.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

J. M. Ellis, being duly sworn, on his oath says that he is the attorney of the city of Denver. That he has read the foregoing replication and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

J. M. ELLIS.

28 Subscribed and sworn to before me this 3rd day of June, A. D. 1899.

(My commission expires March 11, 1900.)

[SEAL.] ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

Indorsed: No. 2854. In U. S. circuit court. Henry V. Johnson, as mayor, *et al.*, plaintiffs, *vs.* Charles B. Wood *et al.*, defendants. Replication to amended answer. Filed Jun- 3, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for pl'ffs.

31st Day, Saturday, June 10th, 1899.

Present: The Honorable Moses Hallett, district judge and other officers as noted on the second day of May last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants Ellen Thomsa Morgan *et al.*, by Willard Teller, Esq., their attorney also come.

And the motion of the defendants for judgment on the pleadings herein coming on now to be heard is argued by counsel, and the court having considered the matter and being now fully advised in the premises,

It is ordered by the court for good and sufficient reasons to the court appearing that the said motion be and the same is hereby denied.

And thereupon on motion of plaintiff it is ordered by the court that he may file herein an amended replication within ten (10) days from this day.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States in and for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

Amended Replication to Amended Answer.

Now come the plaintiffs, and by leave of court first had and obtained file this their amended replication to the amended answer filed herein by said defendant, Samuel B. Morgan:

Deny that the supposed deed of the city of Denver, by Francis H. Case, its mayor, of date February 6th, A. D. 1874, in said
29 amended answer set up, was made or executed or delivered to Joseph P. Machebeuf, the grantee named in said supposed deed, in pursuance of or in conformity to the recommendation of the vote of the city council of the city of Denver, and deny that said supposed deed was or is the deed of the city of Denver.

As to whether the defendant, Samuel B. Morgan, paid to the said Joseph P. Machebeuf as the purchase price of the property, for the recovery of which this action is brought, the sum of twenty thousand dollars ($20,000.00) or any other sum of money, the plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that at the date of said supposed payment, to wit: April 25th, A. D. 1887, or at any time, the said Joseph P. Machebeuf or the said The Colorado Catholic Loan and Trust Association had any title whatsoever in said real property to convey to said Samuel B. Morgan.

As to whether or not said Samuel B. Morgan entered upon or into the possession of said real property under his said supposed deed from said Machebeuf, or the said supposed deed from the Colorado Catholic Loan and Trust Association, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs admit that on the 10th day of June, A. D. 1887, the said Morgan filed a plat or map of said realty in the office of the clerk of Arapahoe county, Colorado, as alleged in said amended answer, but they deny that under or by virtue of said deeds from said Machebeuf and said Colorado Catholic Loan and Trust Association or either of them, the said Morgan acquired any color of title to the lands in controversy herein.

Plaintiffs deny that at any time between the 10th day of June, A. D. 1887, and the bringing of this action, or at any other time, the city of Denver caused to be levied upon said lots in said amended answer mentioned, or upon any of them, taxes for the years A. D. 1888, 1889, 1890, or 1891, or for either of said years, or that said city of Denver has ever at any time caused to be levied upon said lots or any of them any taxes whatsoever.

As to whether or not the said Samuel B. Morgan because of his alleged ownership of said property or for any other reason, paid the several sums in said amended answer mentioned as having been paid as taxes, for the respective years last hereinbefore mentioned, these plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

30 Plaintiffs deny that in the year A. D. 1892, the city of Denver refused to allow any taxes to be levied on said property in controversy or that any action whatever was taken by said city in respect to the levy of such taxes.

As to whether or not the said Samuel B. Morgan has been at all times, or at any time, ready or willing to pay in full the taxes upon said real property for the year A. D. 1892, and for subsequent years, or for any year, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that by reason of any of the matters or things in said amended answer set up, the plaintiffs or either of them are estopped from asserting claim and title to said real property; and deny that by reason of any of the matters or things in said amended answer alleged, the defendant, Samuel B. Morgan, or his codefendants ought to be adjudged the legal owners of the real property in controversy herein. Deny that said Samuel B. Morgan or his codefendants, or any of them, were at any time, or at the time of the beginning of this action, in possession of said property, or any part thereof, in good faith, under or by virtue of color of title.

Plaintiffs deny that the supposed color of title of the defendant,

Samuel B. Morgan, in said amended answer asserted and claimed, was made in good faith; and deny that said Morgan or any of his codefendants was or were in possession of said land for a period of five years subsequent to the first supposed payment of taxes thereon, until the beginning of this action. Deny that by reason of any of the matters or things in said amended answer asserted and claimed or set up the said Samuel B. Morgan or his grantees, or any of them, ought to be held or adjudged the legal owners of said premises or any part thereof, or that said plaintiffs or either of them is or ought to be estopped from asserting claim and title to said premises.

Wherefore, plaintiffs demand judgment as they have heretofore demanded in their complaint herein.

J. M. ELLIS, *City Att'y,*
S. L. CARPENTER,
Att'ys for Plaintiffs.

STATE OF COLORADO, } ss:
County of Arapahoe, }

J. M. Ellis, being duly sworn, on his oath says that he is the attorney of the city of Denver. That he has read the foregoing amended replication and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

J. M. ELLIS.

31 Subscribed and sworn to before me this 19th day of June, A. D. 1899.

My commission expires March 11, 1900.

[SEAL.] HENRY F. JOLLY,
Notary Public.

Indorsed: No. 2854. In U. S. circuit court. Henry V. Johnson, etc., *et al.*, plaintiffs, *vs.* Charles B. Wood *et al.*, defendants. Amended replication to amended answer. Filed Jun- 20, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for plaintiffs.

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor, etc., *et al.*, Plaintiffs, }
vs.
ELLEN THERESA MORGAN ET AL., Defendants. }

Demurrer to Amended Replication.

Now come the defendants herein, by Messrs. Teller & Orahood, their attorneys, and demur to the amended replication of the plaintiffs to the amended answer of Samuel B. Morgan, heretofore filed herein, and for grounds of demurrer show unto the court.

That said amended replication does not make or tender any issue

whatsoever and does not constitute any defense to the matters and things set up in said amended answer.

TELLER & ORAHOOD,
Attorneys for Defendants.

Indorsed: No. 2854. U. S. circuit court, district of Colorado. Henry V. Johnson, as mayor, &c., *et al. vs.* Ellen Teresa Morgan *et al.* Demurrer to amended replication. Filed Jun- 27, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for defendants.

Forty-seventh Day, May Term, Tuesday, July 11th, A. D. 1899.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the second day of May last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants by Willard Teller, Esq., their attorney, also come.

And the demurrer to the amended replication herein coming on now to be heard, is argued by counsel; and the court
32 having considered the matter and being now fully advised in the premises,

It is ordered by the court that said demurrer be and the same is hereby overruled.

In the Circuit Court of the United States, District of Colorado.

H. V. JOHNSON, as Mayor, etc., Plaintiff,
vs.
CHARLES B. WOOD ET AL., Defendants.

It is hereby stipulated and agreed that inasmuch as Samuel B. Morgan was in his lifetime the common source of title of all of the defendants, and inasmuch as the case has been heretofore tried on the answer of Samuel B. Morgan alone,

Now, therefore, it is hereby stipulated and agreed that the said answer heretofore filed by said Samuel B. Morgan shall stand as the answer of all of the defendant- herein, and that all parties shall be bound by the judgment herein, when rendered, the same as though all parties had answered.

J. M. ELLIS,
S. L. CARPENTER,
Attorneys for Plaintiff.
TELLER & ORAHOOD,
Attorneys for Defendants.

Indorsed: No. 2854. U. S. circuit court, dist. of Colo. H. V. Johnson, mayor, &c., *vs.* Ellen T. Morgan *et al.* Stipulation Answer Morgan to stand as answer of all defendants. Filed Nov. 22, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for pl'ff. Teller & Orahood, attorneys for defendants.

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD ET AL., Defendants.

Given.

The counsel for plaintiffs requests the court to instruct the jury as follows:

You are instructed that the law of the case is with the plaintiffs and you will accordingly find a verdict in their favor and that they are entitled to the possession of the lands in controversy.

J. M. ELLIS AND
S. L. CARPENTER,
For Plaintiffs.

Indorsed: 2854. Johnson, mayor, etc., *vs.* Wood *et al.* Instructions given. Filed Nov. 28, 1899. Robert Bailey, clerk.

33 17th Day, Tuesday, November 28, A. D. 1899.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and the defendants by Willard Teller, Esquire, their attorney, also come.

And thereupon the attorneys for the defendants suggest to the court now here the death of the defendant Samuel B. Morgan, and thereupon it is ordered by the court that Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan and Edward B. Morgan heirs-at-law of Samuel B. Morgan, deceased, be and they are hereby substituted as defendants in the place and stead of Samuel B. Morgan, deceased.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and the defendants by Willard Teller, Esquire, their attorney, also come.

And thereupon comes a jury, to wit:

William C. Davis,	Albert Sechrist,	James O. Patterson,
Orange B. Nichols,	Edward R. Hanley,	Milton H. Mack,
Richard Phillips,	Charles McArthur,	Gustave A. Schmidt,
Orville F. Shattuck,	Edward P. Phelps,	R. F. Pickets,

twelve good and lawful men, and they are duly selected and tried, empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And the said jurors having heard the evidence produced herein and the instructions of the court upon their oaths do say, they find the issues herein joined for the plaintiff, and that the plaintiff is the owner in fee and entitled to the possession of the premises in the complaint described, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight west, in the county of Arapahoe in the State of Colorado.

34 Wherefore, it is considered by the court that the plaintiff do have and recover of and from the defendants possession of the property, lands and tenements set forth and described in the complaint and verdict of the jury, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight west in the county of Arapahoe in the State of Colorado, and that he have a writ of possession therefor.

It is further considered by the court that the plaintiff do have and recover of and from the defendants his costs by him in this behalf laid out and expended to be taxed and have execution therefor.

TUESDAY, *November 28th, A. D.* 1899.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary O. Rockwell, The Chamberlin Investment Company, a *Corporation; Margaretta G. Rice, Robert S.* Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, The City National Bank, a Corporation; Cyrus G. Richardson, and Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan, and Edward B. Morgan, Heirs of Samuel B. Morgan, Deceased. } 2854.

Action for possession of specific real property and for damages.

On this twenty-eighth day of November, A. D. 1899, the same being one of the regular juridical days of the November term, A. D. 1899, of this court, there being present the Honorable Moses Hallett, district judge.

It is considered by the court that the plaintiff do have and recover of and from the defendants possession of the property, lands and tenements set forth and described in the complaint and verdict of the jury, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight in the county of Arapahoe in the State of Colorado, and that he have a writ of possession therefor.

35 It is further considered by the court that the plaintiff do have and recover of and from the defendants his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

Thirty-second Day, November Term, Wednesday, December 20th, A. D. 1899.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh day of November last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day come the defendants Ellen Theresa Morgan *et al.* by Willard Teller, Esquire, their attorney, and thereupon on their

motion it is ordered by the court that bond on writ of error in this cause shall be in the sum of five hundred dollars ($500).

In the Circuit Court of the United States, District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver
vs.
ELLEN THERESA MORGAN ET AL.

Now come the said defendants Ellen Theresa Morgan and others and say that in the judgment and proceedings herein there are manifest errors, to wit:

1st. The court erred in overruling the demurrer of the said Ellen Theresa Morgan and others to the amended replication of the said plaintiff filed in this cause.

2nd. The court erred in holding that the plaintiff, the said Henry V. Johnson, as mayor of the city of Denver should or could be allowed or compelled to introduce in evidence the patent of the United States to Joseph E. Bates, as mayor of the city of Denver.

3rd. The court erred in refusing to instruct the jury at the request of the defendants' counsel to find the issues joined herein for the defendants.

4th. The court erred in holding that by the pleadings, the making and delivery of the deeds referred to and described in the defendants' answer were denied in the pleadings, and that defendants must show title by introducing such deeds in evidence.

5th. The court erred in excluding the deed marked Exhibit A, to wit, the deed a copy of which is set forth in the answer of
36 defendant in folios 27 and 28, being the deed of the city of Denver, by Francis M. Carr Case, to J. P. Machebeouf. Bill of exceptions, fol. —.

6. The court erred in refusing to receive in evidence deed from John J. Walley to J. P. Machebœuf. Bill of exceptions, fol. —.

7th. The court erred in refusing to receive in evidence the deed of J. P. Machebœuf to the Colorado Catholic Loan & Trust Association. Bill of exceptions, fol. —.

8th. The court erred in refusing to receive in evidence the deed of the Colorado Catholic Loan and Trust Association to Sam'l B. Morgan. Bill of exceptions, fol. —.

9th. The court erred in refusing to receive in evidence the deed of J. P. Machebœuf to Sam'l B. Morgan. Bill of exceptions, fol. —.

10th. The court erred in refusing to instruct the jury at close of *the* all the evidence offered by either party as requested by the defendants' counsel, said instruction being in writing in words and figures following, to wit:

"The court is asked to instruct the jury to find the issues joined herein (*for*), so far as joined on the right of property between plaintiff and defendant is concerned for the defendant."

11th. The court erred in instructing the jury at the request of plaintiffs' counsel, which instruction was in writing in words and figures following, to wit:

"You are instructed that the law of the case is with the plaintiffs, and you will accordingly find a verdict in their favor, and that they are entitled to the possession of the lands in controversy."

12th. The court erred in entering up judgment for the plaintiff, and in not entering up a judgment for the defendants.

Wherefore, by reason of the many and various errors hereinabove assigned, defendants pray that the said judgment may be reversed and held for naught.

Respectfully submitted.

TELLER & ORAHOOD,
Att'ys for Def'ts.

Indorsed: No. 2854. U. S. circuit court, district of Colorado. Henry V. Johnson, as mayor of Denver, pl'ff, *vs.* Morgan *et al.*, def'ts. Assignment of errors. Filed Dec. 23, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for def'ts.

37 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor, etc., Complainant,
vs.
CHARLES B. WOOD ET AL., Respondents. } No. 2854.

Be it remembered, that on this 28th day of November, 1899, said cause coming on for trial, a jury being duly impanelled and sworn, the following proceedings were thereupon had, to wit:

The substitution of the name of Henry V. Johnson, as mayor in the place and stead of Platt Rogers, as mayor of the city of Denver, under which title the suit was formerly commenced.

It appearing to the court that Samuel B. Morgan, in whose name the answer heretofore filed was made, had deceased, it was ordered that the names of Theresa Morgan, Edward B. Morgan, Jessie —— (formerly Jessie Morgan), and Alice Harrison (formerly Alice Morgan), be substituted as the heirs of the said Samuel B. Morgan.

It further appeared that the said parties had made and entered into a stipulation in words and figures following, to wit:

In the Circuit Court of the United States, District of Colorado.

H. V. JOHNSON, as Mayor, etc., Plaintiff,
vs.
CHARLES B. WOOD ET AL., Defendants.

It is hereby stipulated and agreed that inasmuch as Samuel B. Morgan was in his lifetime the common source of title of all of the defendants, and inasmuch as the case has been heretofore tried on the answer of Sam'l B. Morgan alone,

Now, therefore, it is hereby stipulated and agreed that the said

answer heretofore filed by said Samuel B. Morgan shall stand as the answer of all of the defendants herein and that all parties shall be bound by the judgment herein, when rendered, the same as though all parties had answered.

(Sig.) J. M. ELLIS,
S. L. CARPENTER,
Att'ys for Pl'ff.

(Sig.) TELLER & ORAHOOD,
Att'ys for Def'ts.

38 And thereupon, the said defendants in the case admitted that Platt Rogers was, at the time of the institution of this action, mayor of the city of Denver, that his predecessor in office was Joseph E. Bates, and that Henry V. Johnson, the present plaintiff, is now the mayor of the city of Denver, and successor in office of said Joseph E. Bates.

Whereupon, the plaintiff (ordered) in evidence certified copy of the patent of the United States Government to Joseph E. Bates, as mayor of the city of Denver, covering the land in dispute.

Objection was made by counsel for defendants for the reason that the patent was set up *in hæc verba* in the answer of defendants; that the defendants, as well as the plaintiff, claim title through said patent and through deed from the city of Denver to Bishop Machebœuf, and from him to Samuel B. Morgan, and that the same having been set up in the answer, and not denied in the replication, there was no necessity for its introduction, and inasmuch as the questions arising under it had been passed upon by the court of appeals in the former case, and had thereby become the rule of law of this court.

Objection overruled; to which ruling of the court, defendants by their counsel then and there excepted.

Whereupon, the said patent was received and read in evidence.

This patent is set forth at folio 23 *et seq.* of answer of defendants, and for that reason is not further set forth.

Said patent having been received and read, plaintiff rested his case.

Thereupon defendants, by their counsel, moved the court in writing, in accordance with the rules of the said court, as follows:

In Circuit Court of the United States, District of Colorado.

HENRY V. JOHNSON, as Mayor City of Denver,
vs.
CHARLES B. WOOD ET AL.

The court is asked to instruct the jury to find the issues herein joined for the defendants.

And thereupon, the court overruled the motion, and stated as follows:

"Under the issues as they are now, the defendants must show their title; therefore the request for an instruction to find for the defendants must be overruled."

To which ruling of the court, defendants by their counsel then and there excepted.

39 Whereupon, defendants offered in evidence the following:

1. Deed of the city of Denver, by Francis M. Case, mayor, to Joseph B. Machebœuf, being deed set up *in hæc verba* in defendants' answer, and found in folio- 27 and 28 thereof, to which reference is made. Marked here Exhibit A.

To the introduction of this deed, plaintiff, by his counsel then and there objected.

Objection sustained by the court.

To which ruling of the court, defendants, by their counsel, then and there excepted.

Thereupon the court said: "I will hear the objections of counsel, to Exhibit A.

Mr. CARPENTER: As to the document marked A, if your honor pleases, purporting to be a quitclaim deed from the city of Denver by Francis M. Case, its mayor, to Right Rev. Joseph P. Machebœuf, bishop of Colorado, bearing date the 6th day of February, 1874——

The COURT: I do not understand the gentleman to be now offering that deed.

Mr. TELLER: I offered that and I supposed there was no objection to it.

Mr. CARPENTER: There is objection to it; I thought you were proceeding to offer all your documents so that the objections might be taken at one time. I desire to have now noted my objection to Defendants' Ex. A."

This document was the deed of the city of Denver above referred to, to Joseph P. Machebœuf, and found, as stated, at folios 27 and 28, of defendants' answer.

The plaintiff's counsel thereupon objected to the introduction of the deed for the reason that by reason of an act of the Congress of the United States, of date May 21st, 1872, entitled An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, that the city of Denver and its mayor were without power or authority to convey the lands which were acquired by virtue of the act.

The act refered to *in* found set forth in full in fol. 23, of defendants' answer, to which reference *it* here made.

Plaintiff also objected to the introduction of the said deed for the further reason that "no ordinance or resolution of the city council of the city of Denver authorizing the conveyance Exhibit A, has been shown; and further the supposed deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted.

Said counsel for plaintiff then admitted that the report as set forth in the answer was correct.

40 It was then stipulated by both parties that the journal of the city council in respect to the matter reads as follows:

"The committee on public grounds and buildings of the city of Denver, to whom was referred the petition of the Right Rev. Joseph

P. Machebœuf, bishop of the Roman Catholic church, submit the following report: Denver, Colorado Territory, Jan. 8th, 1874. To the honorable mayor and city council of the city of Denver. Gentlemen: Your committee all report they have examined the foregoing petition and would recommend the prayer of the petition be granted. J. M. Broadwell, W. J. Barker and Mitchell Benedict, committee. The ayes and noes called on motion to adopt the report—ayes, Anderson, Barker, Broadwell, Hartman, Maloney, Soggs, Webb and Moss. Noes, Casserman, McCune, McNamee; eight in the affirmative, three in the negative, carried."

Thereupon the court took the same under consideration until 3 o'clock; and at 3 o'clock, the court said:

The first and second objections made to the deed were overruled by the court of appeals, and of course the ruling of the court of appeals prevails upon this trial.

To the third objection, that the deed does not conform to the petition of Bishop Machebœuf, that seems to be well taken. In the petition to the city council the bishop described himself as the Catholic bishop of Denver, and after reciting that the ground in question was used by the Catholic church in Denver as a burial place, and that great numbers of their dead were therein buried, in the prayer for the deed, he asks that a conveyance be made to him as Catholic bishop, as aforesaid, and to his successors in office forever. The deed which was in fact made, was made to the Right Reverend Joseph P. Machebœuf, bishop of Colorado, in the county of Arapahoe and Territory of Colorado; does not describe him as the Catholic bishop of Denver, as he had requested, and it is made to him and to his heirs and assigns, and not to his successors in office. Under the circumstances, the petition disclosing the intention of the bishop to continue the use of the premises as a cemetery, there probably ought to have been some resolution or ordinance of the city prescribing the terms and conditions upon which the conveyance would be made. It seems that no such resolution or ordinance was passed, but only a vote approving or accepting the report of the committee. There are two reports of committees, one from M. D. Clifford and two others, and one from J. M. Broadwell and two others. The first is more specific than the last. That report is that the committee recommend that the prayer of the petition be granted, and the mayor in behalf of the city of Denver is authorized to make them their deed, provided they pay into
41 the city treasury the cost of the land, and which amounts are actually —, which the city of Denver has been to in obtaining government title. The next report is of the committee who examined the foregoing petition and would recommend that the prayer of the petitioner be granted. That was made at a later date from the first. Whether we take the first report or the second to be the one upon which the city council asked the approval of the petition, it would seem that under section 5 of the charter as it was then there should be an ordinance or resolution prescribing the terms upon which the deed would be made. Section 5 prescribes that the city may take and hold real estate, etc., and then its concluding para-

graph is, "And they shall have the power through and by the city council to sell and convey the same for the sole use and benefit of the inhabitants of said city." As the city council usually acts by resolution or ordinance it is probably true that such resolution or ordinance was necessary in this case. But if that be not true as to all cases, that is to say, if under this section of the charter (*of*) the city was authorized to make conveyances otherwise than by ordinance or resolution, it certainly was not true in this case, where the grant was to be made for a special purpose, and the conditions upon which it would be made needed to be specified. I think the third objection to the deed is well taken. The first and second objections are overruled by the authority of the court of appeals."

And said deed, Exhibit A, having been thus rejected, the defendants, by their counsel, then and there excepted to the ruling of the court.

And thereupon defendants offered in evidence a deed from Joseph P. Machebœuf to the Colorado Catholic Loan and Trust Association, covering the property in controversy, which was the deed dated March 31, 1885.

Objected to by plaintiffs' counsel, because no title was shown in the grantor.

Objection sustained by the court.

To which ruling of the court in excluding the said deed, defendants, by their counsel, then and there excepted.

And thereupon defendants offered deed by the Colorado Catholic Loan and Trust Association to Samuel B. Morgan, which deed bears date May 2nd, 1887, and described the property in controversy, to wit: the south half of the northeast quarter of the southeast quarter of section 2, township 4, south, range 67 west.

42 To which deed the same objection was made by plaintiffs' counsel that there was no title shown in the grantor.

Objection sustained by the court.

To which ruling of the court, in rejecting the said deed, defendants, by their counsel then and there excepted.

Defendants then offered deed of Joseph P. Machebœuf to Sam'l B. Morgan, of date May 25, 1887, for the exact land in controversy, which said deed is set forth in defendants' answer, at folios 31 and 32.

To which plaintiff by his counsel objected for the same reason.

Objection sustained by the court.

To which ruling of the court, in excluding the said deed, defendants, by their counsel, then and there excepted.

And this was all the evidence offered by either party.

And thereupon defendants rested.

And thereupon counsel for defendants submitted to the court a request for instructions in writing in words and figures as follows, to wit:

"In circuit court of the United States, district of Colorado. Henry V. Johnson as mayor of the city of Denver, *vs.* Chas. B. Wood and others. The court is asked to instruct the jury to find the issues

joined herein (*for*), so far as joined on the right of property between plaintiff and defendant is concerned, for the defendant.

But the court refused to give such instruction to the jury.

To which ruling of the court, defendants, by their counsel then and there excepted.

And thereupon, the court, at the request of plaintiffs, instructed the jury as follows, to wit:

"You are instructed that the law of the case is with the plaintiffs, and you will accordingly find a verdict in their favor, and that they are entitled to the possession of the lands in controversy."

To which instruction of the court, the defendants, by their counsel, then and there duly excepted.

And thereupon, the jury returned a verdict as follows, to wit:

"We, the jury in the above-entitled cause, find the issues herein joined for the plaintiffs, and that the plaintiffs are the owners in fee and entitled to the possession of the ground described in the complaint, to wit, the south half of the northeast quarter of the southeast quarter of section 2, township 4, south of range 68 west, in the county of Arapahoe and State of Colorado."

43 To which verdict, the defendants by their counsel then and there excepted.

And thereupon, the court ordered judgment for the plaintiff in accordance with the verdict.

To the entry of which judgment, in accordance with the verdict, defendants by their counsel then and there excepted.

And because the above matters and things do not fully appear of record herein, said defendants present this, their bill of exceptions, and pray that the same may be signed, sealed and made a part of the record herein.

Which is accordingly done.

MOSES HALLETT. [SEAL.]
—— ——. [SEAL.]

O. K.
S. L. CARPENTER.

Dated at Denver, Colorado, this 27th day of December, 1899.

Indorsed: No. 2854. United States circuit court, district of Colorado. Henry V. Johnson, as mayor, etc., pl'ff, *vs.* Charles B. Wood *et al.*, def'ts. Bill of exceptions. Filed Dec. 27, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for def'ts.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, Plaintiff, }
vs. }
TERESA MORGAN, C. B. WOOD, and Others, Defendants. }

The clerk will make record in the above cause (*in the above*): 1, sum's and compl't; 2nd, amended answer; 3d, mandate C. C. of ap-

peals; 4, the replication and dem. thereto; 5, amended replication and dem.; (5), stipulation; 6, bill of ex. and 7, as'g't of errors. Make at once.

TELLER & ORAHOOD,
Attorneys for Def't.

To Robert Bailey, clerk.

Denver, Colorado, —— — 189–.

Indorsed: No. 2854. United States circuit court, for the district of Colorado. Johnson, mayor, etc., *vs.* Wood *et al.* Præcipe for transcript of record. Filed Dec. 27, 1899. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, Edward B. Morgan and William Church are held and firmly bound unto Henry V.
44 Johnson, as mayor of the city of Denver, in the full and just sum of five hundred (500) dollars to be paid to the said Henry V. Johnson, as mayor as aforesaid, his successors in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term, A. D. 1899, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Henry V. Johnson, as mayor of the city of Denver, *et al.*, plaintiffs, and Ellen Teresa Morgan *et al.*, defendants, numbered 2854, in said court, judgment was rendered against the said defendants and the said defendants having obtained a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of said court and a citation directed to the said Henry V. Johnson, as mayor as aforesaid, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Ellen Teresa Morgan *et al.*, defendants, shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

EDWARD B. MORGAN. [SEAL.]
WILLIAM CHURCH. [SEAL.]

Sealed and delivered in presence of

—— ——.

Approved Jan. 6th, 1900.
MOSES HALLETT, *Judge.*

Justification.

STATE OF COLORADO, } ss:
County of Arapahoe, }

William Church one of the sureties on the within bond, being (*each*) first duly sworn deposes and saith that he is worth in real property in Colorado exempt from execution, the sum below set opposite his name, that is to say:

As to William Church five hundred dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLIAM CHURCH.

45 Subscribed and sworn to before me at Denver this 22nd day of December, A. D. 1899.

My commission expires March 2, 1900.

[SEAL.] CLARENCE J. MORLEY,
Notary Public for Arapahoe County, Sate of Colorado.

Indorsed: Gen. No. 2854. Circuit court of the United States, district of Colorado. Henry V. Johnson, as mayor, etc., *vs.* Ellen Teresa Morgan *et al.* Bond on writ of error, $500. Filed this 6th day of January, A. D. 1900. Robert Bailey, clerk, by Charles W. Bishop, deputy clerk.

Writ of Error to United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1899, thereof, between Henry V. Johnson, as mayor of the city of Denver, plaintiff, and Ellen Teresa Morgan *et al.*, defendants, numbered 2854 in said court, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceed-

ings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 19th day of February 1900, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to
46 be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of January, in the year of our Lord, one thousand nine hundred, and of the Independence of the United States the 124th year.

Seal United States Circuit Court, District of Colorado.

Issued at office in Denver, in said district, with the seal of the circuit court of the United States, for the district of Colorado, and dated as aforesaid.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by
MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals a duly certified transcript of the portion (—) the record and proceedings in the within-entitled case, described in the præcipe of counsel, together with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this 11th day of January, 1900.

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Gen. No. 2854. United States circuit court of appeals, eighth circuit. Ellen Teresa Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, mayor etc., defendant in error. Writ of error. To circuit court U. S. district of Colorado. Filed in United States circuit court district of Colorado, this sixth day of January, A. D. 1900. Robert Bailey, clerk, by Charles W. Bishop, deputy clerk. Teller & Orahood, attorneys for plaintiff in error.

47 *Citation on Writ of Error.*

U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit,* } *ss:*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to Henry V. Johnson, as mayor of the city of Denver, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, wherein Ellen Teresa Morgan and others are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this sixth day of January, A. D. 1900.

MOSES HALLETT, *Judge.*

Service copy of the within citation is hereby admitted this 6th day of January, 1900.

J. M. ELLIS AND
S. L. CARPENTER,
Att'ys of Def'ts in Error.

No. 2854. United States circuit court of appeals, eighth circuit. Samuel B. Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, mayor, etc., defendant in error. Citation. Filed in circuit court of the United States for the district of Colorado, this eighth day of January, A. D. 1900. Robert Bailey, clerk. By Charles W. Bishop, deputy clerk. Teller & Orahood, attorneys for plaintiffs in error.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to seventy-eight (78) both numbers inclusive, to be a true, perfect and complete transcript and copy of transcript from 2nd judicial district of the State of Colorado,
48 amended answer of defendant Morgan, demurrer to amended answer of Morgan, mandate, replication to amended answer,

amended replication to amended answer, demurrer to amended replication, stipulation, instructions given, assignment of errors, bill of exceptions, præcipe for record, judgment, and all orders of court subsequent to May 17, 1897, heretofore filed or entered of record in said court, and in a certain cause in said court lately pending, wherein Henry V. Johnson, as mayor of the city of Denver and The City of Denver were plaintiffs and Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, Charles L. McIntosh, trustee, James Nichols, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, The City National Bank, a corporation, Cyrus G. Richardson, and Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan and Edward B. Morgan, heirs of Samuel B. Morgan, deceased were defendants, as fully and completely as the same still remain on file or of record in my office at Denver.

Seal United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this eleventh day of January, A. D. 1900.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

[Cancelled 10c. U. S. rev. stamp.]

Filed Jan. 15, 1900.

JOHN D. JORDAN, *Clerk.*

49 (*Appearance for Plaintiffs in Error.*)

And on the nineteenth day of January, A. D. 1900, an appearance of counsel for the plaintiffs in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver. } No. 1381.

The clerk will enter my appearance as counsel for the plaintiffs in error.

WILLARD TELLER.
H. M. ORAHOOD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1381. Ellen Teresa Morgan, *et al.*, pl'ffs in error, *vs.* Henry V. Johnson, as mayor of the city of Denver. Appearance. Filed Jan. 19, 1900, John D. Jordan, clerk. Willard Teller, H. M. Orahood, counsel for pl'ffs in error.

(*Appearance for Defendant in Error.*)

And on the fourteenth day of February, A. D. 1900, an appearance of counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, etc. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

S. L. CARPENTER.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1900. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor, etc. Appearance. Filed Feb. 14, 1900, John D. Jordan, clerk. S. L. Carpenter, counsel for def't in error.

50 (*Appearance for Defendant in Error.*)

And on the fourteenth day of February, A. D. 1900, an appearance of Mr. J. M. Ellis, as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, etc. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

J. M. ELLIS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1900. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor, etc. Appearance. Filed February 14, 1900, John D. Jordan, clerk. J. M. Ellis, counsel for def't in error.

(*Appearance for Defendant in Error.*)

And on the twenty-eighth day of November, A. D. 1900, an appearance of Mr. Tom Herrington as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, &c. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

TOM HERRINGTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor &c. Appearance. Filed Nov. 28, 1900, John D. Jordan, clerk. Tom Herrington, counsel for def't in error.

51 (*Order of Submission.*)

And on the thirtieth day of November, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

FRIDAY, *November* 30, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, &c. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, the same was argued by Mr. Willard Teller in behalf of the plaintiffs in error and by Mr. Tom Herrington for the defendant in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-eighth day of January, A. D. 1901 an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

52 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1900.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error, *vs.* HENRY V. JOHNSON, as Mayor of the City of Denver, Defendant in Error.	No. 1381. In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Willard Teller (Mr. Harper M. Orahood was with him on the brief) for plaintiffs in error.

Mr. Tom Herrington (Mr. J. M. Ellis, Mr. S. L. Carpenter and Mr. Guy Le Roy Stevick were with him on the brief) for the defendant in error.

Before Caldwell and Thayer, circuit judges, and Adams, district judge.

This was a suit in ejectment instituted in 1892 by Platt Rogers, as mayor of the city of Denver, against Samuel B. Morgan and some forty other persons, grantees of Morgan, for the possession of the south half of the northeast quarter of the southeast quarter of section two, township four, range sixty-eight west, in Arapahoe county, Colorado. In the progress of the cause Henry V. Johnson, present mayor of Denver, and defendant in error herein, was substituted for Platt Rogers, and, by stipulation, the answer of Samuel B. Morgan was made to stand as the answer of all other defendants. On the death of Samuel B. Morgan, Ellen Theresa Morgan, the present leading defendant, and the other heirs-at-law of Samuel B. Morgan, now plaintiffs in error, were substituted as defendants in his place and stead.

The cause was first tried on demurrer to the answer and resulted in a judgment in favor of the plaintiff for the possession of the land in controversy. A writ of error was sued out and the cause brought to this court for review.

On March 1, 1897, the judgment of the trial court was reversed and the cause remanded for further proceedings in accordance with the opinion rendered. *Morgan v. Rogers*, 25 C. C. A. 97.

53 After the cause was so remanded, plaintiff filed a replication to the answer and afterwards filed an amended replication upon which the cause went to trial.

The facts appear sufficiently stated in the former opinion of this court, and the conclusion there reached was: that by virtue of the acts of Congress and the patent of November 15, 1873, referred to in the opinion, the city of Denver acquired an unconditional title in fee-simple absolute to a tract of land including that now in controversy; and that notwithstanding the act of Congress, in question, authorized the city of Denver to make an entry of the land "to be held and used as a burial place for the said city and vicinity," the patent issued, granted to the city such title in fee-simple without

condition as enabled the city to sell and dispose of the land unconditionally, for any purpose deemed by it desirable.

The defendants below claimed in their answer that the city of Denver having such unconditional fee, on February 6, 1874, conveyed the land in question to Joseph P. Machebeuf, and that on April 25, 1887, Machebeuf conveyed the same to Samuel B. Morgan, the defendants' grantor; and this court held in its former opinion that if such were the facts, the title to the lands in question was well vested in Morgan.

The amended replication filed by plaintiff joined issue on certain averments of the answer, relating to assessments of the land in question for city taxes, and the payment of such taxes by Morgan after he acquired title in 1887, and affirmatively pleads that the deed made by the mayor to Machebeuf, on February 6, 1874, was not made or executed pursuant to or in conformity with any vote of the city council of the city of Denver. The balance of the replication, when properly construed, questions the legal sufficiency of the other facts set up in the answer but does not deny the facts as stated.

At the trial below the plaintiff offered in evidence the patent of the United States to Joseph E. Bates, as mayor of Denver, of date November 15, 1873, and rested. The defendants, after an unavailing motion for an instructed verdict, offered in evidence the deed of the city of Denver, by Francis M. Case, mayor, to Joseph P. Machebeuf, of date February 6, 1874. Plaintiff objected to the introduction of this deed and assigned the following reasons therefor: "That by reason of the act of Congress of the United States of date May 21, 1872, entitled An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, the city of Denver and its mayor were without power and authority to convey the lands which were acquired by virtue of the act;" and the further reason "that no ordinance or resolution of the city council of the city of Denver authorizing the conveyance has been shown," and further that "the supposed deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted."

For the purpose of a ruling on these objections, it was admitted by counsel that a certain report of proceedings before the city council, as set forth in the answer, and further stated in the admission, was correct. These papers will be referred to later in the opinion. The trial court disapproved of the first and second grounds of objection, but sustained the third, namely, that the deed offered
54 did not conform to the recommendation of the committee to which the matter was sent and whose report was adopted, and excluded the deed.

Other deeds were offered in evidence by the defendants conveying Machebeuf's title to Samuel B. Morgan. Plaintiff's counsel objected to these deeds on the sole ground that Machebeuf was not shown to have title. The trial court sustained these objections and due exceptions were saved by the defendants to such rulings.

This statement reduces the case, in its broadest aspect, irrespective of the reasons given by the court below for its actions, to the follow-

ing questions: First, whether the city of Denver, in view of the supposed condition alleged to have been created by the use of the words in the act of 1872 "to be held and used as a burial place for the said city and vicinity," had power to convey the lands in question without regard to the condition? Second, whether there was any resolution or other authority granted by the city council to sell the lands in question to Machebeuf? And third, whether the deed actually made to Machebeuf conformed to the resolution or authority granted, if any, by the city council?

ADAMS, district judge, after stating the case as above, delivered the opinion of the court:

The decision of this court rendered on the first writ of error, *Morgan v. Rogers, supra*, is the law of this case. That decision was: that the act of Congress of May 21, 1872, did not operate to annex any condition to the grant authorized by it and that the patent to Bates, as mayor, in trust for the city of Denver, and to his successors and assigns forever, created only a naked, passive trust, under which the entire beneficial use, possession and control vested at once and absolutely in the city of Denver. That decision satisfactorily and conclusively settled the question that the city of Denver had the right and power to convey the land in question to Machebeuf, and notwithstanding the elaborate re-argument of this question by counsel, no further consideration will now be given to it. *Balch v. Haas*, 36 U. S. Appeals 693 and cases there cited.

The only remaining question is whether the city of Denver did convey the land to Machebeuf.

That it recognized a highly meritorious and equitable claim of Machebeuf; that it received the agreed consideration from him therefor; that it undertook to execute a deed to perform its equitable as well as legal obligation; that it permitted the bishop and his grantees to take possession of the land and exercise rights of ownership and control for a period of eighteen years, or more, before it questioned their title, cannot be gainsaid or questioned.

Under such circumstances an insurmountable legal necessity must be found by this court to induce it to disturb the defendant's possession. What is claimed to be that necessity? Substantially stated, it is this: that there was no resolution of the city council authorizing the conveyance to Machebeuf, and that the deed, as made, fails to conform to the resolution claimed to have been adopted.

It appears that on October 28, 1872, Joseph P. Machebeuf, who, as stated by the answer and not denied in the replication, was the bishop of the Catholic church for the diocese of Denver, pre-
55 sented a petition to the mayor and common council of that city in words and figures as follows:

"To the honorable the mayor and common council of the city of Denver:

"Your petitioner, Joseph P. Machebeuf, Catholic bishop of Denver, respectfully represents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe

county, that some time in the year 1863 he purchased for the sum of $200 from one John I. Walley, the following-described piece of land situate in said county of Arapahoe, viz., the N. E. ¼ of the S. E. ¼ of sec. 2, T. 4, S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe county as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and interfered with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of said city of Denver by whomsoever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray, etc.

Denver, Oct., 28, 1872.

JOSEPH P. MACHEBEUF,
Bishop of Denver,
By EDWARD L. JOHNSON,
His Att'y-in-fact."

Such proceedings were afterwards had on that petition that on the 4th day of December, 1873, the committee which had been appointed for that purpose reported to the common council of the city of Denver and to the mayor thereof in words and figures following:

"To the honorable mayor and council:

"Your committee find on examination that within parties had rights previous to the city and would recommend that the prayer of the petitioner be granted and the mayor in behalf of the city of Denver is authorized to make them their deed provided they pay into the city treasury the cost of the land and which means all actual (—) which the city of Denver has been to in obtaining Government title, all of which is respectfully submitted."

Afterwards, and on the 8th day of January, 1874, the committee on public grounds and buildings for the city of Denver, to whom said petition had been referred, reported in the words following:

"The committee on public grounds and buildings of the city of Denver, to whom was referred the petition of the Right Rev. Joseph

P. Machebœuf, bishop of the Roman Catholic church, submit the following report: Denver, Colorado Territory, Jan. 8th, 1874. To the honorable mayor and city council of the city of Denver.
56 Gentlemen: Your committee all report they have examined the foregoing petition and would recommend the prayer of the petition be granted."

The journal of the city council shows that a motion was made to adopt the report of the committee, and that the motion was carried by a vote of eight in the affirmative to three in the negative, and it further appears, by the uncontradicted averments of the answer, that in pursuance of said recommendation and vote of the city council, the mayor, on February 6, 1874, executed and delivered a deed to Joseph P. Machebeuf in words and figures as follows:

"This deed made this 6th day of February, A. D. 1874, between the city of Denver, by Francis M. Case, its mayor, in the county of Arapahoe and Territory of Colorado, of the first part, and the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, of the county of Arapahoe, Territory of Colorado, of the second part, witnesseth, that the said party of the first part for and in consideration of the sum of fifty dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quitclaimed and by these presents does remise, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following-described real estate situate, lying and being in the county of Arapahoe, and Territory of Colorado, to wit: the southwest quarter of section two, township four south of range 68, west. This deed is made by order of the city council of the city of Denver.

"To have and to hold the same together with all and singular the appurtenances and privileges thereto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part either in law or equity to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever, for the purposes aforesaid.

"In witness whereof the said party of the first part by Francis M. Case, its mayor, has hereunto set hand and seal the day and year above written.

"(Signed) THE CITY OF DENVER, [SEAL.]
"By FRANCIS M. CASE,
"*Mayor of Denver.*"

This deed was duly acknowledged on the day of its date, and afterwards, on February 7, 1874, was duly recorded in the appropriate land records for Arapahoe county.

Addressing ourselves now to the first of the remaining objections to the deed to Machebeuf, inquiry must be made whether there was any ordinance or resolution of the city council authorizing the execution of the deed. The petition of the bishop was addressed to the common council of the city of Denver, the duly constituted body

through and by which the city under its organic law alone could exercise the power conferred upon it to sell and convey its real estate. Sections 4 and 5, city charter of 1866.

After setting forth fully his equitable claim to the lands in question, the bishop closes his petition with the prayer "that your honorable body may instruct a good deed of conveyance to be made on the part of the said city of Denver by whomsoever is law-
57 fully empowered, granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop as aforesaid" * * * etc.

This petition was first referred to a special committee which speedily reported that the bishop and his church had rights superior and antecedent to those of the city and "recommended that the prayer of the petition be granted" on certain terms, which, for the present purpose, it is unnecessary to repeat. Soon thereafter, for reasons unexplained, the bishop's petition was referred to the committee of the council "on public grounds and buildings." This committee soon reported that they had examined the petition and recommended that "the prayer of the petition be granted."

The prayer of the petition, so referred to, is thus effectually incorporated in the committee's report, and this report as submitted to the council became, in effect, a recommendation that the council direct a good and sufficient deed to be made conveying the land referred to in the bishop's petition to him as such bishop.

The record shows that there was a motion to adopt that report, and that such motion was duly carried. This in our opinion constitutes direct and sufficient authority emanating from the city council for the conveyance in question. The objection that this authorization was made by motion, instead of by formal resolution or ordinance, is without merit. The city council was empowered by law to act for the city in selling and conveying its property and there was no requirement that its action should be by ordinance.

This court said in *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271: "It is common learning that where a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution." In support of this proposition a large number of cases are cited.

The trial court applied this view of the law and properly overruled plaintiff's objection to the introduction of the deed for want of authorization.

The only remaining question is whether the deed actually made to Machebeuf conformed to the recommendation and report of the committee so adopted by the city council.

It is argued by counsel for the city that if the deed had corresponded to the prayer of the bishop's petition, as recommended by the committee to the council, the grant would have been made to "Joseph P. Machebeuf, Catholic bishop of Denver, and to his successors in office forever." It is further argued that the petition of the bishop as submitted to the council clearly discloses that he claimed the land for his church, and desired a conveyance to him for that

church, but that, contrary to the recommendation of the committee as adopted by the council, and in violation of the trust disclosed in the petition, the deed as executed actually named as grantee the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, party of the first part, with the *habendum clause*, thus: 'To have and to hold all and singular' * * * etc. 'to the only proper use, benefit and behoof of the said party of the second part, his *heirs* and *assigns* forever for the purposes aforesaid.'"

This objection to the deed based on the grounds assigned, or either of them, is, in our opinion, without merit. Let it be conceded
58 that the bishop requested a deed to him as trustee for his church, and that the city authorized the execution of a deed for that purpose.

It is familiar doctrine that the trust need not necessarily be stated in the deed.

A declaration of trust may be contained in a different instrument from that by which the estate is vested in the trustee. Bispham's Principles of Equity, 5th edition, section 65.

The trust under which the bishop was to hold the land was distinctly declared in the petition signed by him and addressed to the city council. It was referred to in the report of the committee and in the adoption of that report by the council. It was distinctly recognized in the deed itself. The title was vested in Joseph P. Machebeuf, his heirs and assigns "for the purposes aforesaid." A careful examination of the deed as made discloses that the words last quoted must necessarily relate to his office named in the deed as bishop of Colorado; in other words, the title as disclosed in the deed is vested in Machebeuf for the purposes of his bishopric.

It is next objected that the *habendum clause* of the deed in question runs to the party of the second part, "*his heirs and assigns forever*" instead of to him and "his successors in office forever," as stated in the petition to the city council. We think this objection overlooks the essential purpose to be accomplished by the deed. That was to convey an indefeasible estate in fee-simple to the trustee. The apt and usual words for that purpose were employed, namely, to him, "his heirs and assigns forever." The "heirs and assigns" here mentioned are not words of purchase but of limitation and any title which might thereafter be devolved upon them would be subject to the same trust as was created by the deed, in the first taker.

It is next objected that the deed was made to the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado," instead of "Joseph P. Machebeuf, bishop of Denver." From what has already been said, it appears that the purpose of the grant was to convey the property in question to Machebeuf, in trust for his bishopric, as disclosed in his petition to the city council. The fact, if it be a fact, that his true title is "Catholic bishop of Denver," cannot avail to defeat the conveyance to him by his proper name, even though his office may have been inaccurately stated. The only effect of such inaccuracy would be to possibly create some uncertainty as to the beneficiaries under the trust; but this possibility is greatly minimized, if not totally ex-

tinguished by the clear declaration of trust found in contemporaneous and antecedent documents. So far as the city of Denver is concerned this criticism of the deed, in our opinion, may be conclusively answered by the suggestion that the language criticised is nothing but *descriptio personæ* and even if inaccurate, there is abundant left to clearly fix the identity of the intended grantee.

In our opinion there is no such discrepancy between the authority conferred and the authority executed as to impair the deed in question.

It follows from the foregoing that Joseph P. Machebeuf acquired good title to the lands in question from the city of Denver, and as the only objection to the other deeds offered in evidence conveying the land from Machebeuf to the defendants was want of title in Machebeuf, such objections should have been overruled and the deeds admitted.

59 We refrain from expressing any opinion on the question argued at the bar as to whether the deed from the city of Denver to Machebeuf was executed by the proper officer or agent of the city, because no such question was raised at the trial below. No objection was made to the introduction of the deed to Machebeuf because of any irregularity in its execution and no assignment of error presents any such question for consideration. We have also not deemed it necessary to pass upon several assignments of error relating to the pleadings or proceedings at the trial, preferring rather to dispose of the case on its merits.

It follows from the conclusions reached, and already stated, that the trial court erred in excluding the deeds offered in evidence by defendants and for that reason the judgment must be reversed.

This cause has now been twice before this court and we have given all phases of it our most serious attention and consideration and the conclusions reached and settled by our deliberate judgments on the two writs of error are: that the city of Denver had the power to convey the land in controversy to Machebeuf, and that it did so. The deeds offered in evidence at the last trial show that Machebeuf has conveyed the lands so acquired by him to the defendants in this case.

A careful scrutiny of the record shows but one possible issue that might again be submitted to the trial court and that is: whether the city of Denver properly executed the direction of the city council to convey the land in controversy to Machebeuf; in other words, whether the proper agent or officer of the city executed the deed.

The facts disclosed by the unchangeable written proof, found in the record, conclusively show that Machebeuf claimed an equitable right to the land in controversy; made his claim known to the city of Denver; secured an effectual authorization by the city council for a conveyance to him; paid an agreed consideration therefor and received the deed which in terms recites that it "is made by order of the city council of the city of Denver."

If, for any reason, the culminating act of executing the deed was irregularly performed; that is to say, if the deed should have been executed by a commissioner appointed by the city council, as claimed

in argument by counsel, instead of by the mayor of the city as done, it was such a mistake or oversight, in no manner disturbing the fixed rights of the parties, as can be readily corrected by an appropriate equitable proceeding. Inasmuch as a further trial at law of this sole remaining issue could undoubtedly be enjoined until such equitable proceedings could be had, we perceive no reason for remanding this cause for a further trial. The controversy has been pending between the parties for nine years, and during that time all the substantial and meritorious questions of difference between them have been settled. It would avail nothing to pursue the litigation further. The judgment is therefore reversed and the cause remanded to the trial court with directions to enter judgment in favor of the defendants.

Filed January 28, 1901.

60 (*Judgment.*)

And on the twenty-eighth day of January, A. D. 1901, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

MONDAY, *January* 28, 1901.

ELLEN TERESA MORGAN and Others, Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, reversed with costs; and that Ellen Teresa Morgan and others, plaintiffs in error, have and recover against Henry V. Johnson, as mayor of the city of Denver the sum of one hundred twelve and $\frac{80}{100}$ dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said circuit court with directions to enter a judgment in favor of the defendants.

January 28, 1901.

(*Petition for Substitution of Party.*)

And on the twenty-first day of June, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, a petition for substitution of party, in words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
61 HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, a Municipal Corporation, Defendants in Error.

Petition for substitution.

To the honorable judges of the United States circuit court of appeals, eighth circuit:

Counsel for the defendants in error respectfully show to the court that on the second day of April, 1901, a municipal election was held in the city of Denver, State of Colorado, pursuant to the laws of the said State, resulting in the election of Robert R. Wright, Jr., to the office of mayor of the said city, to succeed the Honorable Henry V. Johnson. That the Honorable Henry V. Johnson was the mayor of the city of Denver at the time when the decision in the above-named cause was rendered by this honorable court, on the 28th day of January, 1901. That the Honorable Robert R. Wright, Jr., qualified as the mayor of the city of Denver on the 9th day of April, 1901. That as the mayor of the city of Denver is the real party defendant in the above-entitled cause, your petitioners respectfully pray that the Honorable Robert R. Wright, Jr., may be substituted for the Honorable Henry V. Johnson as mayor of the city of Denver, defendant in error, and that the Honorable Robert R. Wright, Jr., mayor of the city of Denver, may be made a party of record in this honorable court for the purpose of presenting a petition for writ of error to the Supreme Court of the United States of America.

Respectfully presented.

PLATT ROGERS,
HALSTED L. RITTER,
Attorneys for Defendants in Error.

(Endorsed:) 1381. U. S. circuit court of appeals, eighth circuit. Ellen Teresa Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor of city of Denver, and The City of Denver, defendants in error. Petition for substitution. Filed Jun- 21, 1901, John D. Jordan, clerk. H. M. Orahood attorney for defendants in error.

(*Order for Substitution of Party.*)

And on the twenty-third day of September, A. D. 1901, in the record of the proceedings of the United States circuit court of appeals, is an order for substitution, in words and figures following, to wit:

62 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1901.

MONDAY, *September* 23, 1901.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, a Municipal Corporation. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard upon the motion of counsel for defendants in error for an order substituting Robert R. Wright, Jr., as mayor of the city of Denver, in the place and stead of Henry V. Johnson, as mayor, etc.

On consideration whereof, it is now here ordered by this court that said Robert R. Wright, Jr., as mayor of the city of Denver, be, and he is hereby, substituted as a defendant in error in the place and stead of Henry V. Johnson, as mayor of the city of Denver.

September 23, 1901.

(*Assignment of Errors.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, an assignment of errors, in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error,
vs.
ROBERT R. WRIGHT, JR., as Mayor of the City of Denver, Defendant in Error.

Assignment of errors.

Defendant in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the hearing of said cause, to wit:

I. The court erred in overruling the judgment of the circuit court on the demurrer of the defendant in error to the answer of the plaintiffs in error to the complaint.

63

II. The circuit court erred in entering an order overruling the demurrer of the defendant in error to the answer of the plaintiffs in error to the complaint, in accordance with the mandate of the circuit court of appeals.

III. The court erred in holding that the act of Congress of May 21st, A. D. 1872, entitled, "An act to enable the city of Denver to

purchase certain lands in Colorado for cemetery purposes," authorized the Government of the United States to convey to the mayor of the city of Denver title to the land in controversy in fee-simple.

IV. The court erred in holding that the act of June 25th, 1890, confirming and approving the patent to the land in controversy was issued and delivered by the Government of the United States under the terms and conditions of the act of Congress of May 21st, A. D. 1872.

V. The court erred in holding that the Government of the United States had, by the issuance of the patent to the land in controversy, parted with the absolute title to the same, and that Congress could not, by the act of June 25th, A. D. 1890, attach or annex other conditions, or further limit the use to which the land so patented might be devoted.

VI. The court erred in holding that under the act of Congress, to wit: the act of May 21, A. D. 1872, wherein and whereby it is provided that the land in controversy may be acquired by the city of Denver in trust for certain purposes, the said city of Denver or its officials could convey the title or part with any portion of said land for other and different purposes, or could part with the same at all.

VII. The court erred in holding that the patent of date November 15th, A. D. 1873, conveyed and vested the legal title to the land described and in controversy in the city of Denver, and not in Joseph E. Bates, the mayor of said city of Denver, and his successors in trust.

VIII. The court erred in holding that, although the grant by patent was in express terms to Joseph E. Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever, that such trust so expressed in said patent, was a mere naked and passive trust, under which the entire beneficial use, possession and control vested at once and absolutely in the city of Denver.

64 IX. The court erred in holding that the city council of the city of Denver was not required to pass an ordinance or a resolution authorizing the conveyance of the land in controversy to Joseph P. Machebeuf.

X. The court erred in holding that the mayor of the city of Denver could make a valid and binding deed to Joseph P. Machebeuf, bishop of Colorado, on February 6th, 1874, under and by virtue of the adoption by the city council of the city of Denver of the report of the committee on grounds and buildings.

XI. The court erred in holding that when the city council of the city of Denver adopted the report of its committee on grounds and buildings which recommended that the prayer of the petition of Joseph P. Machebeuf, bishop of Denver, dated October 28th, 1872, wherein it is prayed that a deed of conveyance from the city to the said Machebeuf be made of the land in question, it was a sufficient authorization and power for the mayor of the city of Denver to make the deed.

XII. The court erred in holding that the city council of the city of Denver could, by the passage of a mere motion, authorize the

mayor of the city of Denver to make a deed to the land in question to Joseph P. Machebeuf, bishop of Colorado.

XIII. The court erred in holding that the deed to the land in controversy made by the city of Denver by Francis M. Case, mayor, was a valid deed.

XIV. The court erred in holding that the deed made to Joseph P. Machebeuf on February 6, 1874, conformed to the recommendation and report of the committee on grounds and buildings as adopted by the city council.

XV. The court erred in holding that the deed to "Right Reverend Joseph P. Machebeuf, bishop of Colorado," on the 6th of February, 1874, pursuant to the adoption of the report by the city council of its committee on grounds and buildings was valid when the said report recommended the deed to be made to "The Right Reverend Joseph P. Machebeuf, bishop of Denver."

XVI. The court erred in holding that the deed to "Right Reverend Joseph P. Machebeuf, bishop of Colorado," was a valid and binding deed, when the petition asks that the deed be made to "Joseph P. Machebeuf, Catholic bishop of Denver," and the committee of the city council recommended the deed to be made in accordance with the petition.

XVII. The court erred in holding that the deed of February 6th, 1874 to the "Right Reverend Joseph P. Machebeuf, bishop of Colorado," is a valid deed when the habendum clause of said deed runs to the party of the second part, "his heirs and assigns forever," instead of to the Right Reverend Joseph P. Machebeuf and "his successors in office forever," which latter was embodied in the petition of the said Machebeuf to the city council of Denver on October 28th, 1872.

65

XVIII. The court erred in holding that Joseph P. Machebeuf acquired good title to the land in question from the city of Denver under and by virtue of the deed of February 6th, 1874.

XIX. The court erred in holding that the said Machebeuf could convey a good and sufficient title to said property to his grantees.

XX. The court erred in holding that the grantees of said Machebeuf have a good and sufficient title.

XXI. The court erred in holding that the trial court erred in excluding the deeds offered in evidence by the defendants.

XXII. The court erred in holding that the proper officer of the city of Denver made and executed the deed of February 6th, 1874 to Joseph P. Machebeuf.

XXIII. The court erred in reversing the judgment of the circuit court and directing that judgment be entered in the circuit court in favor of the plaintiffs in error.

XXIV. The circuit court erred in entering judgment for the defendants in accordance with the mandate of the circuit court of appeals.

PLATT ROGERS,
HALSTED L. RITTER,
Attorneys for Defendant in Error.

(Endorsed:) No. 1381. Supreme Court United States. Ellen Theresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error. Assignment of errors. Platt Rogers, attorney for defendant in error. Filed Oct. 17, 1901, John D. Jordan, clerk.

(*Petition for Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a petition for writ of error, in words and figures following, to wit:

66 In the Supreme Court of the United States.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error, *vs.* ROBERT R. WRIGHT, JR., as Mayor of the City of Denver, Defendant in Error.	Petition for Writ of Error.

Comes now the above-named Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error herein, and says that on or about the 28th day of January, 1901, the circuit court of appeals of the eighth circuit of the United States entered judgment herein in favor of the plaintiffs in error and against the defendant in error, in which judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant in error prays that the writ of error issue in his behalf to the United States circuit court of appeals of the eighth circuit for the correction of errors so complained of.

PLATT ROGERS,
Attorney for the Defendant in Error.

(Endorsed:) No. 1381. Supreme Court United States. Ellen Theresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error. Petition for writ of error. Filed Oct. 17, 1901, John D. Jordan, clerk. Platt Rogers, attorneys for defendant in error.

(*Bond on Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a bond on writ of error, in words and figures following, to wit:

Know all men by these presents that we, the City of Denver, a municipal corporation under the laws of the State of Colorado, Robert R. Wright, Jr., mayor of the city of Denver, and Henry T. Rogers and Henry Youngs as sureties, are held and firmly bound unto

Ellen Theresa Morgan in the full and just sum of one thousand dollars ($1,000), to be paid to the said Ellen Theresa Morgan, her heirs, executors, administrators or assigns, to which payment
67 well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fifth day of October in the year of our Lord one thousand nine hundred and one.

Whereas, lately, at the December term, A. D. 1900, of the circuit court of appeals of the United States, in and for the eighth judicial circuit, in a suit depending in said court between Ellen Theresa Morgan, plaintiff in error, and Henry V. Johnson, mayor of the city of Denver, and The City of Denver, defendants in error, a final decree of the said circuit court of appeals was rendered against the said Henry V. Johnson, mayor of the city of Denver, and the City of Denver, and the said Henry V. Johnson, mayor of the city of Denver, and the City of Denver, having obtained a writ of error to the Supreme Court of the United States of America, to reverse the said judgment of the said circuit court of appeals of the United States in the aforesaid suit, and a citation directed to the said Ellen Theresa Morgan, citing and admonishing her to appear and be in the Supreme Court of the United States at the city of Washington, D. C., sixty days from and after the date of this citation:

Now the condition of the above obligation is such that if the said Robert R. Wright, Jr., mayor of the city of Denver, who has heretofore, by order of the Supreme Court of the United States of America been substituted for and in the place of Henry V. Johnson, mayor of the city of Denver, and the City of Denver, shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

THE CITY OF DENVER,
By R. R. WRIGHT, JR., *Mayor.*

Attested by the undersigned with the corporate seal of the city of Denver.

[Seal of the City of Denver.]

(Signature illegible), *City Clerk.*
HENRY T. ROGERS.
HENRY YOUNGS.

Justification.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Henry T. Rogers and Henry Youngs sureties on the within
68 bond, being duly sworn, each for himself, deposes and says that he is worth, after paying his just debts, the sum of one

thousand dollars, exclusive of property exempt from execution by the laws of the State in which he resides.

HENRY T. ROGERS.
HENRY YOUNGS.

Subscribed and sworn to before me by the above-named Henry T. Rogers and Henry Youngs this 5th day of October, A. D. 1901. My commission expires Nov. 12th, 1904.

[SEAL.] WILLIAM A. REEF,
Notary Public.

Approved Oct. 12th, 1901.
DAVID J. BREWER, *Justice.*

(Endorsed:) No. 1381. In Supreme Court United States of America. Ellen Theresa Morgan *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., mayor of the city of Denver, and The City of Denver, defendants in error. Bond. Filed Oct. 17, 1901, John D. Jordan, clerk. Platt Rogers, attorney for defendants in error.

(*Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a writ of error, the original of which, with the clerk's return thereon, is hereto attached and herewith returned.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Ellen Teresa Morgan *et al.*, plaintiffs in error, and Henry V. Johnson, as mayor of the city of Denver, defendant in error a manifest error hath happened, to the great damage of Robert R. Wright, Jr., as mayor of the city of Denver as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 12th day of October, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. —. Robert R. Wright, Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan *et al.* Writ of error. Filed Oct. 17 1901 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof, I hereto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, Missouri, in the eighth circuit, this twenty-eighth day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

70 (*Citation.*)

And on the twenty-fifth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a citation, the original of which, with admission of service endorsed thereon, is hereto attached and herewith returned.

71 UNITED STATES OF AMERICA, *ss:*

To Ellen Teresa Morgan *et al.*, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Robert R. Wright, Jr., as mayor of the city of Denver, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 12th day of October, in the year of our Lord one thousand nine hundred and one.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. —. Robert R. Wright, Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan, *et al.* Citation. Filed Oct. 25, 1901. John D. Jordan, clerk.

Service of the within citation is hereby admitted this 19th day of October, 1901.

WILLARD TELLER,
Att'y for Def't in Error.

72 *Clerk's Certificate to Transcript.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing seventy-two pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals in the case of Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., mayor of the city of Denver, substituted for Henry V. Johnson, mayor of the city of Denver, defendant in error, December term, 1900, as full, true and complete as the same remain on file and of record in my office.

I further certify that on the thirtieth day of March, A. D. 1901, a mandate was issued out of the clerk's office of said circuit court of appeals, pursuant to the judgment of that court, directed to the circuit court of the United States for the district of Colorado.

I do further certify that the original writ of error, with clerk's return thereon, and the original citation with admission of service endorsed thereon, are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-eighth day of October, A. D. 1901.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,319. U. S. C. C. of appeals, 8th circuit. Term No. 192. Robert R. Wright Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan *et al.* Filed November 18, 1901.

FILE COPY.

FILED
OCT 13 1902
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

No. 13

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

HALSTED L. RITTER,
FREDERICK A. WILLIAMS,
Attorneys for Plaintiff in Error.

CLAY B. WHITFORD,
GREELEY W. WHITFORD,
HENRY E. MAY,
Of Counsel.

(No. 18519)

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was an action of ejectment brought in 1892 by plaintiff in error in the state court of Colorado to dispossess the defendants in error of twenty acres of land held by them against the claim of the mayor and the municipality that the lands were a part of a congressional grant to the mayor in trust, "to be

held and used for a burial place for said city and vicinity," and having been so acquired, granted, held and used for such public purpose was therefore absolutely inalienable. (Folio 2.)

The case was removed from the state District Court, on a petition of defendants in error, to the United States Circuit Court for the district of Colorado. (Folio 9.)

On May 21, 1872, the following act of Congress was approved and became a law of the United States:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:
>
> "That the mayor of the city of Denver, in Colorado Territory, be, and he is hereby, authorized to enter through the proper land office, at the minimum price per acre, the following lands belonging to the United States, to wit: The northwest quarter of the southwest quarter of section number one, and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section number two, in township number four, south of range number sixty-eight west of the sixth principal meridian, in the territory of Colorado, being one hundred and sixty acres of land lying adjacent to said city of Denver, to be held and used as a burial place for said city and vicinity. Approved May 21, 1872." (Volume 17. Statutes at Large, page 140.)

That thereafter, and in virtue of said special enactment of Congress, for the purposes therein named and not otherwise, the president of the United States signed and issued the following patent for 160 acres, embracing the twenty acres in controversy, to "Joseph E. Bates, mayor, in trust for the city of Denver, Colorado Territory":

"To all to whom these presents shall come, Greeting:

"Certificate No. 2044. Whereas Joseph E. Bates, mayor in trust for the city of Denver, C. T., has deposited in the General Land Office of the U. S. a certificate of the register of said office at Denver City, C. T., whereby it appears that full payment has been made by said Bates, mayor in trust, for the city of Denver, according to the provisions of the act of Congress of the 24th of April, 1820, entitled an act making further provisions for the sale of public lands for the N. W. ¼ S. W. ¼ Sec. 1; the S. W. ¼ N. E. ¼ and the N. ½ S. E. ¼ Sec. 2 tp. 4, S. R. 68 W., in the district of lands subject to sale at Denver City, C. T. containing 160 acres according to the official plat of the survey of the said lands returned to the Gen. Land Office by the surveyor general, which said tracts have been purchased by the said Bates mayor in trust for said city.

"Know ye that the U. S. A. in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted

and by these presents do give and grant unto the said Bates, mayor in trust for said city and to his successors the said tracts above mentioned, to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging unto said Bates mayor in trust for the city of Denver, and to his successors and assigns forever, subject to any vested and accrued water rights for mining, agricultural or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local custom, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

"In testimony whereof, I, U. S. Grant, President U. S. A. have caused these letters to be made patent and the seal of the Gen. Land Office to be thereunto affixed. Given under my hand at the city of Washington, the 15th day of November, 1873, and of the Independence of the U. S. the 98th.

"By the President:

"(Seal U. S.) U. S. GRANT,

"by Z. B. STURGES, asst Sect.

"L. K. LIPPINCOTT

"Rec. Gen. L. Office."

Rec. Vol. 4, page 329.

Owing to an error of description in the enactment of May 21, 1872, Congress passed the following act amending the act of 1872:

"A Bill to Amend an act to Enable the city of Denver to purchase certain land for Cemetery purposes:

"Whereas, at the second session of the Forty-second Congress an act approved May twenty-first, eighteen hundred and seventy-two (seventeen statutes at large, page one hundred and forty) entitled an 'Act to Enable the City of Denver to Purchase Certain Lands in Colorado for a Cemetery' erroneously describes a tract of land as the northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, and the southwest quarter of the southeast quarter of section two, township four south range sixty-eight west sixth principal meridian; and

"Whereas, The said City of Denver, has paid for and received a patent for the Northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, township four south range sixty-eight west sixth principal meridian, which latter description is correct and in accordance with the land actually occupied by the said city of Denver for a cemetery; now, therefore,

"Be it enacted by the Senate and the House of Representatives of the United

States of America in Congress assembled, that an act entitled 'An act to enable the city of Denver to purchase certain lands in Colorado for a Cemetery' approved May twenty-first, eighteen hundred and seventy-two, be, and the same is hereby amended as follows: Strike out the words 'the southwest quarter of the southeast quarter' and insert in lieu thereof the words, 'the Southwest quarter of the northeast quarter' so that the description of the said land in the said act shall read:

"'The northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, and the southwest quarter of the northeast quarter of section two, township four south, range sixty-eight west, of the sixth principal meridian.'

"Section 2. That the United States patent issued November fifteenth, eighteen hundred and seventy-three, conveying the northwest quarter of the southwest quarter of section one, and the southwest quarter of the northeast quarter of section two, and the north half of the southeast quarer of section two in township numbered four south of range sixty-eight west of the sixth principal meridian, in the Territory of Colorado, to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be, and the same is hereby approved and confirmed. That the said city of Denver be, and it is hereby, authorized to vacate the use

of the said land, or any portion thereof, as a cemetery, and to appropriate and use the same or any part thereof for a public park or grounds, and to no other purpose."

The land described in these acts and patent is about two miles distant from the present business center of the city. The grounds are elevated, sightly and overlook the city. These lands were used as a cemetery, by the people of the city of Denver and vicinity, as early as 1859, by Catholics, Hebrews and others, and ever thereafter to this day, and were in 1872 beyond the corporate limits of the city of Denver and far removed from the inhabited portion of the town.

These facts relating to the location of the grounds with reference to the city are not in the record, but they are well known to every citizen of Denver, and they will not be disputed.

The patent issued November 15, 1873, and was recorded in volume 4, page 329, of the records of the general land office, and recorded at Denver, in the county clerk and recorder's office on the 26th day of March, 1875.

On October 28, 1872, the Right Rev. Joseph P. Machebeuf, then bishop of the Catholic church for the diocese of Denver, filed and presented a petition to the mayor and common council of the city of Denver as follows:

"To the honorable the mayor and common council of the city of Denver:

"Your petitioner Joseph P. Machebeuf, Catholic bishop of Denver respectfully rep-

resents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe County, that some time in the year 1863 he purchased for the sum of two hundred dollars from one John I. Walley, the following described piece of land situate in said county of Arapahoe, viz, the N. E. ¼ of the S. E. ¼ of sec. 2 T. 4. S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe County as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and (interefered) with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

"Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of the said city of Denver by whomso-

ever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray, etc.

"JOSEPH P. MACHEBEUF,
"Bishop of Denver.
"By EDWARD L. JOHNSON,
"His Att'y-in-fact.

"Denver, Oct. 28, 1872."

(Folio 14.)

The petition of Bishop Machebeuf was referred to a special committee, which, on December 4, 1873, reported, recommending that the prayer of the petition be granted. (Folio 15.)

Thereafter, on January 8, 1872, the committee on public grounds and buildings made a like report upon the same petition, and thereafter the city of Denver, by Francis M. Case, its mayor, made its deed to the Right Rev. Joseph P. Machebeuf of the N. E. ¼ of S. E. ¼ of Sec. 2, T. 4 S., R. 68 west, being the land in controversy. (Folio 16.)

On the 25th day of April, 1887, Joseph P. Machebeuf made a conveyance of the south half of said land to Samuel B. Morgan, who platted and subdivided the same into lots and blocks as an addition to the city of Denver, and from whom the other defendants in error deraign their pretended title.

On September 1, 1892, Platt Rogers, as the mayor of the city of Denver, instituted this action in ejectment against the said Morgan and others for the pos-

session of the last above described tract of land. (Folio 2.)

To the complaint an answer was filed. By the answer the defendants admitted that the patent of the United States bearing date the 15th day of November, 1873, was issued by virtue of the act of Congress, approved May 21, 1872, but assert title under the proceedings of the common council of the city of Denver and the deed of date February 6, 1874, alleging a valuable consideration and payment of taxes for several years. (Folios 12-21.)

To the answer a demurrer was interposed, the principal ground of the demurrer being that the legal title, notwithstanding the deed to Machebeuf, and from Machebeuf to Morgan, was still in the mayor of the city of Denver in trust for the purposes enumerated in the acts of Congress and specifically set forth in the patent, and that the city of Denver or its mayor could not part with title to any part thereof. (Folio 23.) This demurrer was sustained. The cause was appealed to the Circuit Court of Appeals of the Eighth circuit, and that court, on March 1, 1897, reversed the judgment of the Circuit Court of the United States for the district of Colorado, to which judgment of the Circuit Court of Appeals error was prosecuted to this court, but the same was dismissed because, in the opinion of this court, the judgment of the Court of Appeals was not final.

The opinion of the Court of Appeals in reversing the judgment is to be found in volume 25 of the U. S. C. C. App. Repts., page 97; 79 Fed., 577.

Samuel B. Morgan, having died, the name of Teresa Morgan and other heirs were ordered substituted therefor. (Folio 37.)

Henry V. Johnson, having been elected mayor of the city of Denver, his name was ordered substituted for that of his predecessor in office, Platt Rogers (folio 25), and Robert R. Wright, Jr., having been elected mayor of the city of Denver, in April, 1901, his name was ordered substituted for that of his predecessor, Henry V. Johnson, as plaintiff in error. (Folio 62.)

On remittitur from the U. S. C. C. of Appeals the Circuit Court for the district of Colorado overruled the demurrer to the amended answer (folio 25), whereupon the plaintiff filed a replication and afterwards an amended replication. (Folios 26 to 28 and 29 to 30.)

The defendants filed a demurrer to the amended replication, which was overruled by the court. (Folios 31 and 32.)

The charter of the city of Denver, as it existed at the date of the passage of the act of authorization, on May 21, 1872, and on the date of the patent, November 15, 1873, contained the following provisions:

> "Section 4. The inhabitants of the said city, by the name and style aforesaid, through and by the city council, shall have power and authority to purchase, hold, possess and enjoy both real and personal property for a city hall, jail, public grounds and for other public purposes, and shall have power and authority to sell and convey the same; and may also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city

for burying grounds and cemeteries and improve the same."

"Section 5. The inhabitants of said city, by the name and style aforesaid, shall have power and authority, and they are hereby empowered and authorized to take and hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise; and they shall have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city."

Section 23, chapter 17, of the Revised Statutes of Colorado, 1868, being the chapter concerning conveyances, is as follows:

"The board of county commissioners of any county, or the common council of any city, may, by order to be entered of record among the proceedings of such board or council, appoint a commissioner to sell and convey any real estate belonging to such city or county and to affix to any conveyance thereof the seal of such city or county; and such conveyance executed in accordance with such order shall have the effect to transfer to the grantee named all the estate of such county or city in the real estate so conveyed."

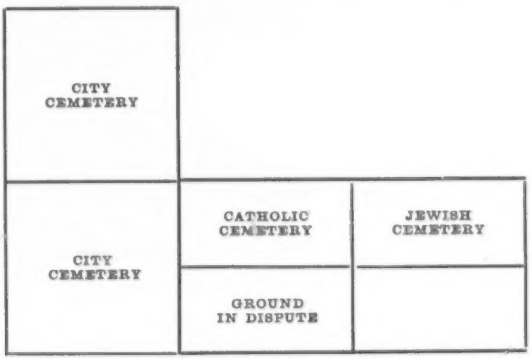
On November 28, 1899, the case was tried to a jury. The plaintiff introduced the patent of May 21, 1872, and rested. The defendants thereupon offered in evidence the deed of the city of Denver, by Francis

M. Case, mayor, to Joseph P. Machebeuf, being the deed set up *in haec verba* in defendant's answer. (Folio 16.) This deed was objected to on the grounds, 1st, that the city of Denver and its mayor were without power or authority, under the act of Congress of date May 21, 1872, to convey the lands which were acquired by virtue of said act; 2d, that no ordinance or resolution of the city council of the city of Denver had been shown authorizing the conveyance; 3d, that the deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted. (Folio 39.) The court overruled the first and second objections upon the opinion in this case by the Circuit Court of Appeals (25 U. S. C. C. App. Rep., 97; 79 Fed., 577), and sustained the third ground of the objection and excluded the deed. (Folio 40.) Defendants then offered another deed from Bishop Machebeuf to Samuel B. Morgan, and from him to the several defendants herein, which were likewise rejected. (Folios 41 and 42.) The court then instructed the jury to return a verdict in favor of the plaintiff. (Folio 32.)

The defendants thereupon sued out a writ of error from the U. S. Circuit Court to the U. S. Circuit Court of Appeals. On the 24th of January, 1901, the judgment was reversed and the court below was directed to enter judgment in favor of the defendants, whereupon a writ of error was issued out of this court to the Circuit Court of Appeals and this case brought here for review.

The last opinion of the Circuit Court of Appeals is to be found in 106 Fed. Rep., 452.

We think a little plat showing the shape of the ground would be of assistance to the court, and we venture to give one in the form inserted in defendants in error's brief when the case was here before. By the patent the lands conveyed were the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 1, and the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 2, and the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 2, Tp. 4 S., R. 68 W. The shape of the tract would be this:



SPECIFICATION OF ERRORS.

We contend that the Honorable Circuit Court of Appeals erred in holding that the words in the act of Congress of May 21, 1872, "to be held and used for a burial place for said city and vicinity," did not impress the land in controversy with a trust.

Second—That the court erred in holding that the government had parted with the absolute title to the land in controversy without impressing thereon any trust whatsoever by the act of Congress of May 21,

1872, and the patent issued in pursuance thereof, dated November 15, 1873.

Third—That the court erred in holding that the grant by patent, although in terms a trust, was a mere naked, passive trust, under which the entire beneficial use, possession and control vested at once absolutely in the city of Denver.

Fourth—That the court erred in holding that "although the use to which it was expected the land would be put is mentioned, it is rather as an explanation of the reason for permitting such unusual entry of the land by a municipal corporation than for any other purpose."

Fifth—That the court erred in holding that there are no words in the act of Congress restricting the use of the said land to cemetery or other purposes.

Sixth—The court erred in holding that the patent of date November 15, 1873, conveyed to, and vested the legal title to the land in controversy, in the city of Denver and not in Joseph E. Bates, the mayor of said city, and his successors, in trust.

Seventh—The court erred in holding that the city of Denver could make a valid and binding deed to the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, on February 6, 1874, or to any other person.

Eighth—The court erred in holding that the deed to the land in controversy made by the city of Denver, by Francis M. Case, mayor, was a valid deed, or that it conveyed any title whatsoever.

Ninth—The court erred in holding that the deed made to Joseph P. Machebeuf on February 6, 1874, conformed to the recommendations and report of the

Committee on Grounds and Buildings, as adopted on motion by the city council.

Tenth—That the court erred in holding that the proper officer of the city of Denver made and executed the deed of February 6, 1874, to Joseph Machebeuf.

ARGUMENT.

Our contention is that the land in controversy is absolutely inalienable under the terms of the act of May 21, 1872, and the patent of November 15, 1873, issued in pursuance of said act.

The act of 1872 and the patent should be construed together. There is but one purpose to be accomplished by all these proceedings leading up to and culminating in the issuance of the patent. The act contemplates the patent, and the patent is issued in virtue of the act. Together they disclose the intention of the government, and the two must be construed together.

We think it hardly necessary to cite authorities on this proposition, but we venture to cite the following generally supporting this rule of construction:

Johnson vs. Moore, 28 Mich., 3.

Torrence vs. Shedd, 112 Ill., 466.

Watson vs. Boylston, 5 Mass., 411.

Stuyvesant vs. Western Mtgs. & Inv. Co., 22 Colo., 28.

Clough vs. Bowman, 15 N. H., 504.

The various questions raised for review by this writ of error very largely solve themselves by the de-

termination of the intention and purpose of Congress by the act of 1872 and the construction to be given the patent issued by the government in pursuance of the act.

We think that the rules applicable to conditions precedent and subsequent, in ordinary conveyancing, between individuals, have no application here.

Board of Com. vs. Young, 59 Fed., 100.

Campbell vs. City of Kansas, 102 Mo., 326.

Here is the creation of an exclusive right by the sovereign power of the nation, conferred upon a single individual, in his official capacity, for the use and enjoyment of the members of a certain community, to enter, receive and hold land as a burial place. No one else has a like privilege. Why did Congress pass this act and confer this exclusive privilege in this particular instance? What moved Congress to so act? Was it to enable the mayor, or the municipality, to sell it for a bagatelle, subdivide it into lots and hawk them upon the market? We think not. The statute does not evince such a purpose. The act declares an express use for a different purpose. The title of the act, as well as the act itself, declare the purpose and intention of Congress. The granting clause of the act declares how the grant shall be held, viz., "to be held and used as a burial place for the said city and vicinity." This is the express purpose and intention of Congress,and the maxim *expressio unius est exclusio alterius* applies. Shall this plain, unambiguous language employed by Congress be so construed so as to give it effect, or shall it be so construed as to eliminate from the act the express and declared purpose of Con-

gress, and thus defeat the object for which it was "to be held and used?"

Furthermore, Congress did, in effect, make a gift and donation to Denver and "vicinity" in its effort to dedicate this public land, already being used for cemetery purposes. (Folio 14.) This land was within the territory of the Kansas Pacific R. R. land grant, and therefore held at the maximum price. The act of 1872, in permitting the mayor of the city of Denver to enter this land, authorized the entry to be made at the minimum price instead of the maximum, contrary to the general law, thereby giving one-half of the price of the land to the "said city and vicinity."

In the case of the Leavenworth R. R. vs. United States, 92 U. S., 633, Justice Davis, in speaking of an act of Congress granting land, says in construing the same:

> "It should neither be enlarged by ingenious reasoning, nor diminished by strained construction. The construction must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension and the other of limitation—they must be accepted in a sense most favorable to the grantor. And if a right be asserted against the government it must be so clearly defined that there can be no question of the

purpose of Congress to confer it. In other words, what is not given expressly or by necessary implication is withheld."

Justice Brewer, in Lake Superior Ship Canal Co. vs Cunningham, 155 U. S., 354-373, in delivering the opinion of the court, construing a land grant case, uses this language:

> "Further, the grant to the state of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the act of Congress that the lands should be applied by the state to no other purpose. Even if there had been no such express declaration, such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the state of Michigan had no power to appropriate these lands to any other purposes, certainly no act of any executive officer of the state could accomplish that which the state itself had no power to do."

The act of 1872, and the patent thereunder, granted the land in controversy to the mayor of the city of Denver in trust, "to be held and used as a burial place for said city and vicinity." We deny that the trust created by the act of Congress, and the patent to the mayor, was a mere naked, passive trust, as was assumed by the Honorable Court of Appeals. While the title of the act declares that it was to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, the granting clause con-

ferred a beneficial use, in the event of the purchase of said lands by the city, in the people in the "vicinity," as well as the inhabitants of the municipal corporation. The act declares it shall "be held and used as a burial place for said city and vicinity." Congress recites that the lands are "lying adjacent to the city of Denver," and evidently intended to confer, and did confer, equal privileges upon the people in the "vicinity" of the city of Denver as upon the people of the city itself. So that the title vested in the mayor in trust for the people outside of the city of Denver, as well as for the inhabitants of said city. The grant was not exclusively for the citizens of Denver. Furthermore, while the charter at the date of the act of 1872 provided that the city might hold land for cemetery purposes outside of the corporate limits, Congress well knew that the legislature might at any time take away the authority, hence an additional reason for granting the lands to the mayor in trust for said city and vicinity. If this is true, the trust was not a naked, passive one, which, under the statute of uses, passed to the municipality itself. The corporation could not take the title for the people outside of the city limits under the statute of uses, but the legal title remained in the mayor in trust for the purposes named in the act, viz., "for the said city and vicinity."

> "A grant to a municipal corporation for the purpose of establishing some charitable trust outside of the city limits for the benefit of the people having residence within the city, can not be sustained under the rule that

the municipal corporation can not serve as trustee in purely private trusts."

Tiedeman Mun. Corp., Sec. 204.
Dillon Mun. Corp. (4th Ed.), Sec. 565.

Therefore the Congress intelligently and wisely made the grant to the mayor in trust, instead of to the city of Denver, for the obvious reason that the corporation could not hold the trust estate for the benefit of the people living outside, and in the vicinity, of the city of Denver.

Therefore, the legal title being in the mayor in trust, the city of Denver could not, and did not, convey any title whatsoever by its deed to Bishop Machebeuf, dated February 6, 1874.

The reasoning of the Court of Appeals proves too much for defendant in error. It absolutely nullifies the act of the common council of the city of Denver in executing the deed to Bishop Machebeuf on the 6th day of February, 1874. If it is true that Joseph E. Bates, as mayor, took the title to said land free from any trust, except a passive one, then, in that view of the act of 1872 and the patent thereunder, the title conveyed did not pass from Bates, under the statute of uses (even if the Court of Appeals were right in saying it was not an active trust), to the city of Denver, for the reason that there was no power in the charter of the city of Denver to hold lands outside of the city limits for purposes other than a cemetery. If Joseph E. Bates, as mayor, received this land in trust, as private property for the city of Denver, the land being beyond the corporate limits, then the statute of uses could not so operate as to pass the title to the

municipal corporation in the absence of express authority in the charter to receive and hold the same. Therefore the title could not and did not pass, the Honorable Court of Appeals to the contrary notwithstanding, to the city of Denver, and Bishop Machebeuf took nothing by his deed of February 6, 1874.

But, even if we are in error in our position with respect to the operation of the statute of uses, and it should be held that the title to the lands did pass to the municipal corporation, still, and in that event, the municipal corporation would take the land as a public trust, for the exclusive use of the public, and not in its private and individual capacity. The lands being impressed with a trust by the act of Congress and the patent of the government, the title could no more be conveyed by the municipal corporation, than by the mayor as trustee. The lands being held for a public trust were inalienable for any purpose.

In Rosseau vs. City of Troy, 49 How. Pr., 492, one Vanderheyden, on the 20th day of May, 1796, conveyed to the then village of Troy a plat of land for the purpose of burial ground. There was an application for an injunction to restrain the city from using the ground to erect a city hall thereon. With reference to the title of the city the court uses the following language:

> "Holding the title to the premises, not as absolute owner, but simply and only for the purpose specified in the deed, it is not readily seen how the defendant could divest itself of the trust and appropriate the land to its own use for city purposes and erect

thereon a building required for the transaction of its municipal business. Had the property been conveyed to an individual, to be held for the same object, and he had accepted the trust, could he, in violation thereof, remove the bodies there reposing and proceed to erect a dwelling thereon for his own occupation? I see no difference between the two cases. The fact that the custodian of the title and the trustee to carry out the interest of the grant is a municipal corporation, does not impair the force of the argument, and one has no greater right to use the premises for his own purposes than the other."

And again:

"Neither do I question the power and right of the defendant to remove the dead when that is necessary for sanitary reasons, though from the length of time which has elapsed since burials have taken place therein (if the answer be true) it is difficult to see the existence of any such reasons, and they must exist to justify it. All this fails to meet the point, which is, that a trustee holding property for the purpose expressed in the grant can not, in violation of the trust, convert the premises so held to his, or its own use. Such a proposition, it seems to me, shocks the moral sense and can not be maintained."

In Stockton vs. Newark, 42 N. J. Eq., 531, 9 At. Rep., 203, the court say:

"If the title to the land was held by the township under the act of 1804 merely in trust for the purposes of the charity (use as a burial ground), the city holds it in like manner and upon the same trust. But it is urged by the answer that the city holds it irrespective of the act of 1804 as public property generally, without the impress of a trust or of devotion to any particular use upon it. This claim can not be sustained. How did the city get title except under the act of 1804? And what title has it except such title? Before that act the title was in the grantees, under the deed from the proprietors, or of the survivor or survivors of them, or their heir at law of the last survivor. If it be conceded that the Indian title was valid, the city has no title to the land under it. If the land was dedicated to the public use as a burying-ground by the old settlers, the power of the city over it, under such dedication, is only for the protection and regulation of the public use. It can not sell the land, nor release nor extinguish the use, for which the land was dedicated, nor employ it in any way variant from the purposes for which it was designed. Trustee vs. Hoboken, 33 N. J. Law, 13.

"Under the act of 1804, the title was vested in the township as a corporation to be appropriated and forever remain to and for the several use or uses expressed in the deed from the proprietors, and for no other use or uses whatever. The city, if it took the title

under the act and its charter, took it subject to that provision, and with a trust impressed upon it."

And the court further says:

"The object of burial is not to put the dead away temporarily, but to place them in a final resting place. When land is given in trust for a burial place, it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently, and the unauthorized disturbance of their remains is regarded with abhorrence as a desecration, and is criminal. A trust for a burying-place devotes the ground to the perpetual repose of the remains of the dead. It dedicates it to uses of the most sacred character. The burying-ground is God's acre."

In La Societa Italiana, etc., vs. City and County of San Francisco, 131 Cal., 169; 63 Pac., 174, the court say:

"That the city held said cemetery lands in trust for public uses, as a cemetery, can not be questioned, and it is equally clear that the plaintiff is a private corporation, and that a grant to its use is not a grant to a public use, even though the corporation uses it only for burial purposes." * * *

"It is sufficient to say in reply that the board of supervisors had no power to devote the land to any other than public uses, and the plaintiff was bound to know that they had no such power. The city and county can not be bound by the unauthorized acts of its agents."

In City of Columbus vs. Town of Columbus, 82 Wis., 374; 52 N. W., 425, the court say:

"The town holds the naked legal title to the cemetery grounds in trust for the inhabitants of the town and city exclusively for burial purposes. The town has no beneficial interest whatever in the property. It is powerless to convey it for any other than burial purposes. The town has no beneficial authority, or to appropriate to its own use any portion of the proceeds of sales of burial lots. * * *

"Because the town has no beneficial interest in the property, and because the use for which it holds the legal title thereto, in trust, is purely a public use, the fact that it holds the title is no impediment to the exercise by the legislature in its discretion of the power to change the trustee; saving to the inhabitants of the town and city all their beneficial interests and rights in the trust property."

In Board of Commissioners vs. Yound, 59 Fed., 97, the United States Circuit Court of Appeals for the Sixth circuit say:

> "Where land has been conveyed to a village for use as a public burying-ground, the village council, in their character as trustees, can not abandon the use, and thereby defeat the beneficial interest of the public."

Commonwealth vs. Rush, 14 Pa. St., 186, was a bill in equity upon the relation of the attorney general to restrain the erection of a dwelling house on a public square of the city of Allegheny. The court uses this language:

> "The act of assembly under which this town (now city) was laid out, is in the nature of a contract, and to be construed in the same manner as the contract of any proprietor of the town with the public, on their purchasing lots within the proposed town. He designates certain portions of his plan as lots for sale, other portions as streets or highways, for the use of the public, and again, other portions as public squares; he may designate the purpose for which they may be used, either as 'public squares' generally, or as situations for cemeteries, churches, markets, and the like, and for whatever purpose they are designated and appropriated, both the proprietor and the public, or lot holders, are bound by it. The proprietor can not withdraw the property from the public; his contract binds him, and it must remain; nor, on the other hand, can the public change the use or purpose for which it was originally designed, or at least not so long as there is a

single individual interested dissenting from the proposed alteration. They accepted the grant for the purposes named, and are bound to adhere to it." * * *

"The next question is, Have the city council a right to sell and convey this property to individuals for private purposes? * * * *

"The property is not theirs for sale. The use to which it is to be applied is but a debt—the private debt of the corporation; and it is violating the first principle of a trust when a trustee attempts to apply the trust property to his own use or to make money out of it. The city authorities therefore had no right to sell this property, and the title of the purchasers derived from them is wholly defective and can avail them nothing."

The case of Weekes vs. City of Galveston, 21 Texas Civil Appeals, 102; 51 S. W., 544, is a case where the city of Galveston leased Pelican Island and Flats, which constitute for several miles the northern boundary of Galveston harbor, and lie parallel with Galveston island, and are of great value for the preservation and improvement of the harbor and for increasing the maritime facilities of the port. In 1856 this island was beyond the limits of Galveston city, and was not available for municipal purposes. The court held the act of February 2, 1856, conveying the island to the city of Galveston, was in trust for the use and benefit of the public at large, and not merely for private uses, and hence the city had no power to

lease it for a long term of years to an individual for private purposes. The court say:

> "In construing the act of February 2, 1856, we should look beyond the words of the statute to ascertain the intent and purpose of the legislature. That municipal corporations may acquire and hold property for public as well as for corporate uses seems to be well settled, and, when a grant is for public purposes, duties are imposed upon the grantee which can neither be ignored nor their performance be delegated to others than the governing power of the corporation."

And to the same effect is the case of the City of Oakland vs. Oakland Water Front Company, 118 Cal., 160; 60 Pac., 277.

In the case of City of Visalia vs. Jacob, 65 Cal., 434; 4 Pac., 433, the court say:

> "After a street has been legally laid out and dedicated the municipal government retains or acquires a right of entry as agent of the public, clothed with the trust and duty of protecting and regulating the public use. The right of possession is held by the corporation for the benefit of the public and this right can not be conveyed to any private person. The lands so held are effectually withdrawn from commerce, while the street continues, as are those spoken of in Hoadly vs. San Francisco. As the municipality can not

convey the title, or relieve itself of the trust, private persons are virtually precluded from acquiring it."

The case of Clark vs. San Francisco, 124 U. S., 639, Vol. 31, Law. Co-op. Rep., 554, was a case where the city council of the city passed an ordinance which made it "the duty of the mayor to enter at the land office at the minimum price all the lands within the city above the natural high water mark of the bay of San Francisco 'in trust for the several uses, benefit, and behoof of the occupants or possessors thereof according to their respective interests.'" Thereafter Congress passed an act which "relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinance of said city," the land in controvery. This court, in construing said act of Congress, said:

> "In its legal effect the act of Congress conveyed the lands to the city for the uses and purposes specified in the ordinances and the order of the city ratified by the act of the legislature. In this way the two squares as designated in the report of the commissioners, approved by the order of October, 1856, were dedicated to public use as squares. Lands so dedicated could not lawfully be conveyed by the city to private parties."

To the same effect are:

San Francisco vs. Itsell, 80 Cal., 57.

Alton vs. Tr. Co., 12 Ill., star pages 38-60.

Augusta vs. Perkins, 3 B. Mon., 437.

Giltner vs. Carrollton, 7 B. Mon., 686.

Matthews vs. Alexandria, 68 Mo., 115.

Tiedeman, Mun. Corp., section 262, also section 202.

Story vs. R. R. Co., 90 N. Y., 124.

Warren vs. Mayor of Lyons, 22 Iowa, 315.

Brown vs. Manning, 6 Ohio Rep., 304.

North Yarmouth vs. Skillings, 45 Me., 133.

Dillon Mun. Corp. (4th Ed.), section 575.

The history of this land in controversy all tends to show that the property was specially dedicated by the act of Congress and by the city of Denver, with the approbation of Bishop Machebeuf and the public generally, to be used, and used only, as a public burial ground. The land, although public land, had been used for a burial ground for at least nine years prior to the act of 1872. (Folio 14, petition of Machebeuf.) Under these circumstances, with the dead of the Catholic church and others already buried there, Congress granted the land to the mayor of the city of Denver in trust, to be held and used as a burial place "for said city and vicinity." Bishop Machebeuf's petition (folio 14) to the city council of the city of Denver, dated but five months after the act of Congress of 1872, stated that the land had been procured from the government "to be used as a cemetery," and feared that some action might be taken by the city in the

laying out and arranging of the same, to the displeasure of the feelings and wishes of the members of the Catholic church, and therefore prayed for a deed to that portion of the land thus occupied by the members of the church as a burial place, which embraced the land in controversy herein. The city council acquiesced in the petition and granted the same, in effect setting it over to the Catholic denomination of Denver and vicinity as a place for the burial of their dead. It was already a burial ground, and was deeded to Bishop Machebeuf as and for a burial place. (Folio 14, petition of Machebeuf.) It was the evident intention of all parties that the land should be a cemetery. It had been used as a cemetery prior to the act of 1872 and long subsequent thereto.

The answer avers that the land in controversy was in the possession of Bishop Machebeuf in 1873, and from that time up to and until some time in 1887, and that said grounds were during all that time used as a burial place for the members of the Catholic church. (Folios 16 and 17.) This was a complete dedication of the land to the public use as a cemetery, and, therefore, the ground was not, nor any part of it, subject to alienation.

The charter of the city of Denver, as it existed in 1872, 1873 and 1874 provided as follows: "And may also for the use of the inhabitants of said city purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same." It will be observed that the charter is silent on the subject of alienating grounds once acquired for cemetery purposes. Being public land in 1872, they were necessarily outside of the cor-

porate limits, and the city of Denver had no power to acquire or hold land outside of its boundaries, except for cemetery purposes. It having so acquired them, it had no power under the law of its organization to alienate them. The charter authorized the city to hold any such lands "for the use of the inhabitants of said city," and, while the city was without authority in its charter to sell or convey lands thus held, it was equally without authority under the general principles of law to alienate land thus acquired for a charitable or public use.

This court in City of Cincinnati vs. White, 6 Peters, 431, book 8, L. Co-op. Rep., 452, said:

> "There is no particular form or ceremony necessary in the dedication of land to the public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation."

To the same effect see:

Davidson vs. Reed, 111 Ill., 167.

Redwood Cemetery vs. Bandy, 93 Ind., 246.

Colbert vs. Shepard, 89 Va., 401.

In the case of Hunter vs. Turstee, 6 Hill (N. Y.), 407, the court say:

> "Dedication, as the term is used in reference to this subject, is the act of devoting or giving property for some proper object, and

in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it, rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedications is different. A dedication may be made without writing; by act in pais, as well as by deed." * * *

"No certain period of time is required to prove a dedication of property to public use. It does not depend upon the lapse of time, but upon the intention and the acts of the parties. Twenty years' adverse holding may bar a right of entry, and upon it a grant may be presumed. But time, although cogent evidence of dedication, is not a necessary ingredient in it. It may be established by acts, unequivocal in their character, on the part of the owner and the public, although occurring on a single day."

In people vs. Holladay, . . . California . . . ; 5 Pac., 798, the court said:

"If the property in dispute was dedicated in 1858 to public use, of course the act of Congress of 1864 did not destroy or in any respect impair such dedication; but on the contrary, as said here in Hoadley vs. San Francisco, 50 Cal., 274, 'by granting and relinquishing the title of the United States to the city for the uses and purposes mentioned

in the act of March 11, 1858,' it ratified and confirmed the dedication and made it operative upon the legal title, as well as such title as the city held prior to the act of July 1, 1864, and thus virtually perfected the dedication."

"Staking off ground as a cemetery and allowing burials therein amounts to a dedication."

Hagaman vs. Dittmar, 24 Kan., 42.
Hayes vs. Houke, 45 Kan., 466.

If the legal title did pass to the city of Denver, as held by the Honorable Court of Appeals, then the land was held by the corporation for a purely public purpose, and not in its private or individual capacity. If it was held for a public purpose, it was inalienable and not subject to the payment of the debts of the city.

Merriweather vs. Garrett, 102 U. S., 472.

If, on the other hand, it was held for private use, as distinguished from public and governmental purposes, it would in that case be alienable and consequently liable for the debts of the corporation, and subject to levy and execution sale. Will it be contended here that the land in controversy, after having so long been used as a cemetery and granted by the government as a burial place, could be levied upon and sold to satisfy the debts of the corporation? This, it seems, is the inevitable result of the holding of the Honorable Court of Appeals.

"The property of a municipal corporation which is essentially public in its nature,

and is held in trust for the public by the corporation, and is necessary for the proper exercise of its municipal functions, can not be sold to satisfy the debts of the corporation.

"But the private property of a municipality, held for purposes of income or sale, unconnected with any governmental use or function, may be levied on and sold to satisfy a judgment rendered against the municipal corporation."

20 Am. and Eng. Enc. of Law (2d Ed.), page 1190.

New Orleans vs. Louisiana Constr. Co., 140 U. S., 654.

Birmingham vs. Rumsey, 64 Ala., 353.

Curry vs. Savannah, 64 Ga., 290.

Darlington vs. N. Y., 31 N. Y., 164.

Wellington vs. Wellington, 46 Kan., 213.

For these reasons we believe that the judgment of the Honorable Court of Appeals should be reversed.

Respectfully submitted,

H. L. RITTER, AND
F. A. WILLIAMS,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

(Term No. 13.)

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN ET AL.

Brief and Argument of Plaintiff in Error in Reply.

I.

The principal error of which we complain goes back of the second opinion of the Court of Appeals to the first opinion of that court.

It is involved in the ruling that the act of Congress and the patent conveyed an absolute title to the mayor; that the statute of uses operated to transfer his title to the city, and that the deed of the city and its grantees operated to vest the title in private individuals, and to divest the public of any interest in the land in controversy.

We contend, as we have contended from the beginning, that the purpose of the act of 1872 was to create and perpetuate a public beneficial use in these lands; to that end to transfer the legal title to a designated municipal officer

of eminent character in his representative capacity; to impress the title in his hands with a public trust, so that his title and the beneficial use could never be alienated or lost.

We urge such a construction of the act as will accomplish this purpose, while the decisions of the Court of Appeals most effectually defeat it.

In the first opinion the court announced that "the act of Congress of May 21, 1872, * * * did not operate to annex any condition to the grant so authorized." And the opinion declares that—

"In this case, although the use to which it was expected the land would be put is mentioned, it is rather as an explanation of the reason for permitting such an unusual entry of the land by a municipal corporation, than for any other purpose. There are no words restricting the use to that mentioned, nor providing for forfeiture in case the land is put to other use. The patent by which the title to this land was conveyed vested the land absolutely in fee, and without the mention of any use whatever."

We think this view of the Court of Appeals is based upon an erroneous conception of the purpose and effect of the act of 1872. The terms which Congress employed and which were intended to limit the estate are assigned the rank of a mere expression of the "expectation" of Congress, with an implication that if the expectation is not realized it will make no difference.

It is unmistakable that "Congress has plenary power to prescribe the nature of the title that may be acquired in any public lands and to prescribe the procedure by which such title may be acquired." Fee *vs.* Brown, 17 Colorado, 510, (p. 519.)

"It may donate the land or it may exact different prices and affix different conditions, in connection with the acquisition of the title to different tracts. It may repeal, extend

or limit previous enactments at will, provided prior vested rights are not injuriously affected." (*Ibid.*)

In saying that these words afford a mere "explanation of the reason" for the passage of the act, the court virtually holds that the words employed, which, we contend, were used in order to authorize the conveyance of a limited estate, did in fact create an unqualified and unlimited title.

It seems to us that the terms of the first act are so plain that they are not subject to any but the plainest construction.

In Leavenworth R. R. *vs.* United States, 92 U. S., 733, Justice Davis said:

"The meaning should neither be enlarged by ingenious reasoning nor diminished by strained construction."

In Lake Superior *vs.* Cunningham, 155 U. S., 354, Justice Brewer observed:

"It was declared in the act of Congress that the lands should be applied by the State to no other purpose. Even if there had been no such express declaration, *such* a *limitation* would be *implied* from the declaration of Congress that it was *granted for the given purpose.*"

The effect of this construction by the Court of Appeals is to eliminate these words from the act of Congress, and the same construction would defeat the effect of many town-site acts, acts granting lands to aid in the construction of railroads, or for educational or other purposes.

The court speaks of this as an "unusual entry." We think it was a remarkable entry. The mayor might, if he possessed the necessary qualifications as to citizenship, etc., as an individual, acquire lands of the United States under the pre-emption, homestead, and timber-culture statutes, but as mayor he had no authority to purchase any such lands.

The purpose, we may say the controlling and only pur-

pose of the act, was to qualify the mayor, as mayor, to enter and acquire title to these lands for a specific purpose.

The qualification was to the mayor and not to the city. In such cases the act is to be so construed as to limit the qualification in the manner and to the person intended.

"The grant of the sovereign confers upon the donee capacity to take according to the purpose and extent intended, no more and no less." Goodell *vs.* Jackson, 20 Johns., 693.

"And the legislative will is not to be frustrated by the application of technical rules which apply to and govern private grants."

Rutherford *vs.* Green, 2 Wheat., 196.

"The title was intended to be vested in the office perpetually, not in the man."

Smith *vs.* Pipe, 3 Colorado, 196.

II.

The Court of Appeals say, as to the act of 1890, that "the provision of this later act as to the use to which the land might be put is inoperative."

The purpose of the later act was, first, to correct a mistaken description of part of the land entered, though not the land in controversy, and, second, to authorize a substantial alteration in the use to which the land might be put. It was originally part of the public domain and was intended to be retained perpetually for public use.

This was a plain legislative interpretation of the meaning and purpose of the first act.

This ruling of the Court of Appeals on the second review nullified the controlling feature of the second act; but the construction contended for by the defendants in error in this case would defeat, and the decision of the Court of Appeals practically nullifies, both acts of Congress in their most essential feature.

The Court of Appeals say in the second opinion that the second act confirms the patent. This is true; but it should be decisive of this case that the patent and the act authorizing the patent conveyed the land to the mayor and not to the city.

The first act provided "that the mayor of the city of Denver, Colorado Territory, be and he is hereby authorized to enter, through the proper land office, at the minimum price per acre, the following lands * * * to be held and used as a burial place for the said city and vicinity."

The patent conveyed the land "unto the said Bates, mayor, in trust for said city, and to his successors, to have and to hold * * * unto said Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever."

The second act confirmed this conveyance to the mayor and his successors in precise terms, providing:

"SEC. II. That the United States patent issued November 15, 1873, conveying (here follows description) to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be and the same is hereby approved and confirmed."

There is no room for interpretation or construction. There is no authority for nor any conveyance to the city, as a municipal corporation, and the title was thus conveyed to and confirmed in the mayor and not in the city or its assigns.

We observe both the spirit and the letter of the acts of Congress, by holding that the title is still in the mayor, and that he and he alone can maintain ejectment.

III.

Why was the land to be conveyed to the mayor and not to the city—and why in trust? It would be no wild conjecture to say the purpose of Congress was twofold:

First. That there should always be an officer to hold the legal title, independent of any charter provisions affecting the capacity of the city to take and hold this land.

The charter of the city was adopted by the territorial legislature and was, of course, subject to amendment or repeal. The constitution of Colorado, adopted in 1876, continued all such municipal corporations with special charters, reserving the right to the legislature to amend or repeal them at any time.

The people of the city of Denver always had the right to surrender their charter and to reincorporate under the general laws of the Territory or State. In either case serious questions might arise as to the power or capacity of the city to hold this land, and Congress might well be said to have intended complete immunity from all legislative changes in the charter or general laws, or any lack of corporate power in the city to administer a trust of this character.

Second. Congress might well be supposed to have intended this title to be exempt from barter and sale, and thus safeguarded against either the incapacity, imprudence, or corruptness of any city council.

If the sale in this instance is sustained, and the power of the city to convey a small portion of this land is upheld, it is easy to foresee it is only a question of time when other parcels will be offered and sold; and it requires no great knowledge of municipal affairs to predict that the sale will be of small advantage to the city and of great advantage to the purchaser or purchasers, and the whole tract of land

may ultimately be diverted from the purposes intended by Congress.

It will be neither a cemetery nor a public park, and the title of the bill might well have been a bill for "An act to enable the city of Denver to acquire and dispose of certain lands at the pleasure of the city council."

IV.

In order to sustain its position, the court of appeals decided that the trust was a passive one, and that the statute of uses of the Territory of Colorado operated upon this title, and transferred it from the mayor to the city of Denver.

We do not think it is possible for any State legislature to control or in any manner to alter, abridge, or enlarge the effect of an act of Congress.

Whatever title was authorized and conveyed by the first act vested, *eo instanti*, upon the passage of the act and the delivery of the patent.

The nature of the title to be acquired could only be specified by Congress, and the legislature of the Territory of Colorado was impotent, either by its enactments in the charter of the city of Denver or in its statute of uses, in any manner to affect this grant or purchase.

And yet under the decision of the circuit court of appeals the act of the sovereign law-making power of the nation was controlled by the legislative act of one of its own creatures, the territorial assembly of Colorado.

In some townsite cases the acts of Congress confer upon the legislatures the power to legislate as to the manner of administering the trust; but, unless the power is so conferred, State legislation can neither reach nor affect the subject-matter of the national grant.

The Colorado legislature could no more transfer this title from the mayor to the city than it could originally create or qualify the title.

Counsel for defendants in error, commencing on page 48 of their brief, cite numerous cases, most of which are based upon the case of Slegel *vs.* Lauer, 148 Pennsylvania, 236. In all of these cases, including Van Ness *vs.* City of Washington, 4 Peters, 232, from which counsel quoted voluminously, we would apply the language used in Stuart *vs.* Easton, 170 U. S., page 395:

"It is apparent in all the cases cited that the purposes for which grants were made were really all the purposes for which the grantees could lawfully hold real estate."

It is apparent, therefore, that counsel have, even upon their own theory, misapprehended the case presented to this court. Under the provisions of the charter of the city of Denver, the city was empowered to hold real estate for a number of purposes, one of which being for cemetery purposes, and Congress, in granting the real estate in controversy to the mayor of the city of Denver, prescribed as a condition of the grant that the property should have relation to one specific power of the city of Denver, namely, that of holding lands for cemetery purposes.

V.

In the second opinion, 45 C. C. A., 452, the Court of Appeals, refusing to reconsider the law as announced on the former review, reversed the ruling of the trial court as to admission of the deed from the city to Bishop Machebeauff, and also the deeds of Bishop Machebeauff and his association to Mr. Morgan (pages 39, 40).

The objection that the city had no power or authority to authorize this conveyance includes the proposition that the city had no title to convey. The Court of Appeals reversed this holding, deciding substantially that the city did have the title; that the variance between the report of the committee, which recommended a conveyance to the bishop and

his successors, and the deed which transferred the title to Bishop Machebeauff, his heirs and assigns, was immaterial.

The court was compelled to overrule the first and second objections upon the authority of the Court of Appeals, involving upon the second trial the fundamental error because of which we have invoked the jurisdiction of this court.

VI.

With regard to the estoppel alleged in the answer, it is sufficient to say that under the laws of the Territory and State, and under the constitution of the State of Colorado, cemeteries are exempt from taxation.

> Article X of the constitution of Colorado, sections 4 and 5, Mills' Annotated Statutes, page 697, section 654.

Besides it was not alleged that the taxes were paid for the period of five years, so that the statute of limitations of that State could not be invoked in that behalf.

It should also be said that under the statutes of Colorado the assessment of property was not at that time made by the city of Denver, but by a county assessor, who was not at any time an officer of the city, but was elected by the people of the whole county.

> General Statutes of Colorado, 1883, pages 831, 832, sections 2852-2855.

The only function performed by the city in the matter was the levy of a certain rate per cent. of taxes upon information from the county assessor and county clerk as to the total amount of the assessable property within the city limits, without any notice that any particular tract of land in the city had or had not been valued or assessed.

> Colorado General Laws 1877, 104.

And, besides, if the city had no power to grant these lands, then no acts of the city could work an estoppel.

And, again, it is not alleged that anything done by Mr. Morgan, either in the payment of the original consideration moneys or afterwards, was done in consequence of any acts of the city, and no facts are therefore alleged to constitute an estoppel *in pais*.

VII.

It is alleged in the amended answer of Mr. Morgan that he paid these taxes in good faith. We do not impeach the good faith of any of the parties to this transaction. We say, however, that the question of title does not depend upon the question of good faith in any one, but upon the question of power, namely, the power of the mayor or the power of the city council to convey these lands, and it cannot be claimed that Mr. Morgan made his purchase *without notice* of the nature and quality of the title which he was endeavoring to acquire. He could not make out his title without invoking the act of 1872, and that act was notice to him and all purchasers as to the true nature and limited quality of the title.

VIII.

We submit to this court that the ruling of the trial court upon the first trial as to the effect of the amended answer of Mr. Morgan was right, and, as it contains a complete statement of the attitude of that court on both trials, we take the liberty of inserting it here in full:

"Judge Hallet, in ruling upon the demurrer, delivered the following opinion:

"'No. 2854, Platt Rogers, mayor of the city of Denver, against Charles B. Wood and others, is an action of ejectment. Plaintiff's title is a patent from the United States, bearing date November 15th, 1873, issued under the act of Congress, approved May 21st, 1872, 17 Statutes at Large, page

140, which authorized the mayor of the city of Denver, in Colorado Territory, to enter certain tracts of land described in the act, to be held and used for a burial place for said city and vicinity. In the patent which was granted to Joseph E. Bates, then mayor of the city of Denver, the language used is that it is granted to him in trust for the city of Denver, according to the provisions of the act of Congress of the twenty-fourth day of April, 1820, entitled "An act making further provisions for the sale of the public lands." This recital of the act under which the patent was issued is clearly a mistake.

"'The act of 1820 was never extended to the Territory of Colorado, and, therefore, no grant could be made by any officer of the Government pursuant to its terms. It is a well-established rule that a patent for land must be authorized by some act of Congress, otherwise it will be void, and if this patent should be referred to the act of 1820 as the authority upon which it was issued, it would be void in conformity with that rule.

"'We are, therefore, not authorized to say that it is founded upon that act, and looking for another act upon which it may rest, we come to the act to which I have referred, of May 21, 1872, which authorized the mayor of the city to take these lands, in the words of the act, "to be held and used for a burial place for the said city and vicinity." I have no doubt that these words of the act are to be taken and read in connection with the patent, and the patent is of the same force and effect as if the language of the act had been inserted in it. The words, "in trust for the city of Denver," must be taken to mean in trust for the purposes expressed in the act of May 21, 1872; that is to say, to be held and used for a burial place for said city and vicinity. And land granted in this manner for a special purpose is to be held by the grantee, who has only the naked title inalienable in his hands. The mayor has no power to make a deed of these lands to any one. He could only hold them for the purposes expressed in the act, and the city was equally impotent. No authority was vested in any one to make any conveyance whatever of these lands. Therefore, the several answers in which the defendants in the suit set up title under a deed from the city of Denver, the date of which I do not now recall, but which was a deed to Joseph P. Machebeuf, the

bishop of Colorado, are insufficient. No one, neither the mayor of the city nor the city itself, nor the legislature of the State, nor any other authority, could grant these lands for any purpose whatsoever without the consent of the General Government; and, inasmuch as the city authorities could make no grant of the lands, no act of theirs could work an estoppel to the city in respect to them. Where one has no capacity to grant directly, he cannot, by conduct, create an estoppel which will have the effect to convey the title. An estoppel cannot work the result of conveying the title if the person to be estopped never had title which he could grant. There was no right in the city nor in the mayor to grant these lands, and therefore nothing that they could do, not all the acts alleged in the answers, can be an estoppel which will have the effect to transfer the title to the persons claiming the benefit of the estoppel and for the same reason the deed which was executed by the city is not color of title in the sense of the law which upon payment of taxes by the occupants of the lots could give title to them. The deed being void from the beginning and of no force whatever, is not color of title within the meaning of the statute. So also the lands, under the constitution of the State and under the statute of the State, were exempt from taxation. The statute provides and the constitution provides that lands held for purposes of burial are not subject to taxation. Therefore, no one by paying taxes could acquire title in the lands. The statute does not run in respect to such lands.

"'There must be a right on the part of the Government to levy taxes before the payment of such taxes can inure to the benefit of the party paying them.

"'These are briefly the views I take of the question raised by the several demurrers to the several answers of the defendants, and the several demurrers will be sustained.'"

IX.

In conclusion, the money consideration for the conveyance authorized by the act of 1872 was nominal. The real consideration was the public benefit. This land had always been part of the public domain. Previous to the passage of that act it had been occupied by various societies—the He-

brews, the Catholics, the Grand Army of the Republic, the Masons, the Odd Fellows, and the city—each controlling separate portions of it for the use of their own members and citizens, but without any title whatever, and having the interest of squatters only.

Congress intended by the passage of these two acts that this land should retain, *sub modo*, its public character, and be perpetually used for public purposes.

When for sanitary reasons the question of abandonment as a cemetery was agitated, Congress authorized such a change as would still comport with its original purpose—that of setting apart the land perpetually for the use of the people as a public park. As to any rights of occupancy by the various societies, whether Jew or Gentile, they should remain undisturbed, subject to the control incident to all municipal corporations in the exercise of the police power, but the remainder of the land should be preserved and perpetuated as a part of the heritage of the people of the city of Denver and vicinity.

The construction contended for by the plaintiff in error would restore this land to the public use originally intended by Congress.

HALSTEAD A. RITTER,
FREDERICK A. WILLIAMS,
Attorneys for Plaintiffs in Error.

[redacted]

[redacted]

ROBERT [redacted],
Plaintiff in Error,

vs.

ELLEN [redacted],
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

WILLARD KELLER,
CLAYTON C. HOWELL,
Attorneys for Defendants in Error.

(13,819.)

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

A connected and chronological statement of the facts involved will render the questions presented upon this writ of error easy of solution.

In the year 1863 Joseph P. Machebeuf, who was then Catholic bishop, purchased from John I. Walley the northeast quarter of the southeast quarter of section 2, township 4 south, range 68 west, paying therefor the sum of two hundred dollars ($200). The land was conveyed to him and he immediately went into possession thereof, which possession was maintained until a conveyance to Morgan, hereinafter described, in the year 1887.

From the time of said purchase until shortly prior to the year 1887, the said piece of land was used by the members of the Catholic church as a burial place.

On May 21, 1872, the Congress of the United States passed an act entitled "An act to enable the City of Denver to purchase certain lands in Colorado for cemetery purposes." This act provided in substance that the Mayor of the City of Denver was authorized to enter at the minimum price per acre certain lands, including, among others, the tract first herein above described, to be held and used as a burial place for the said city and vicinity. (Folio 12.)

On November 15, 1873, a United States patent was issued, conveying to Joseph E. Bates, Mayor, in trust for the City of Denver, the tract of land first herein above described, with other land. This patent recited that full payment therefor had been made by the said Bates, Mayor, in trust for the City of Denver, according to the provisions of the act of Congress of April 24, 1820. Said patent granted the lands unto the said Bates, Mayor, in trust for said city, to have and to hold the same unto the said Bates, Mayor, in trust for the City of Denver, and to his successors and assigns forever. (Folio 13.)

Immediately after the obtaining of said patent the said Machebeuf, Catholic bishop, filed a petition with the Mayor and common council of the City of Denver, setting forth the fact of his purchase of the property above described and of his possession and use thereof as a burial place for the members of the Catholic church; setting forth, further, that he understood the City of Denver had obtained a patent covering the property, and praying that a deed might be made conveying the fee thereof to himself. (Folio 14.)

On December 4, 1873, within nineteen days after the issuance of the patent aforesaid, a committee of the council, which had been appointed for that purpose, reported upon said petition of Machebeuf to the effect that the petitioner had rights prior to those of the city, and the committee recommended that the prayer of the petition be granted and that the Mayor, on behalf of the city, be authorized to make a deed thereof, upon the payment into the city treasury of the cost of the land and the actual expenses which the City of Denver had been to in obtaining government title. (Folio 15.)

On January 8, 1874, less than sixty days after the date of the patent, the committee on public grounds and buildings reported that they had examined the said petition and recommended that the prayer thereof be granted. (Folio 15.) A vote was taken, on motion to adopt the report, and the same was adopted by a vote of eight in the affirmative and three in the negative. (Folio 40.) Thereupon, on the 6th day of February, 1874, and less than ninety days after the issuance of said patent, a deed was executed, purporting to be between the City of Den-

ver, by Francis M. Case, its Mayor, and the Right Reverend Joseph P. Machebeuf, bishop of Colorado, reciting a consideration of fifty dollars ($50), the receipt of which was acknowledged, and conveying unto the party of the second part, his heirs and assigns forever, the tract of land first herein above described. The deed recited that it was made by order of the city council of the City of Denver, and the habendum clause was to the party of the second part, his heirs and assigns forever. The deed was signed: "The City of Denver (Seal), by Francis M. Case, Mayor of Denver," bore the imprint of the city seal, and was acknowledged by Francis M. Case, Mayor of the City of Denver, to the effect "that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth." (Folio 16.)

At the time of these transactions the charter of the City of Denver provided, among other things, that the inhabitants of the said city, by the name and style aforesaid, through and by the city council, should have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and for other public purposes, and should have power and authority to sell and convey the same, and might also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries, and improve the same; and the charter provided, further, that the inhabitants of said city, by the name and style aforesaid, should have power and authority, and they were thereby empowered and authorized, to take,

hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise, and that they should have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city. (Folio 17.)

The aforesaid deed to Machebeuf was forthwith delivered and by him recorded on the following day, to wit: February 7, 1874, in the records of Arapahoe county. Machebeuf was then in possession of the property, had been since 1863 and continued in such possession until 1887. During all this period the said tract was used as a place of burial for members of the Catholic church, until just prior to the year 1887. All such burials, however, were made in the north half of said tract, so that the south half of the northeast quarter was entirely free from graves. About the year 1887 the City of Denver had grown to such an extent that the residence portion thereof was in immediate proximity to this place of burial, and the subject of burials in that place become a matter of public discussion in the newspapers and elsewhere; the newspapers and others interested in the welfare of the city insisting that burials in that place should be discontinued, and they were discontinued, and subsequently but prior to this action, by resolution of the board of health, a department of the city council, burials in said ground were prohibited. Said resolution was passed in the month of August, 1892. In the spring of 1887, and after the cessation of burials in this tract of ground, as aforesaid, one Samuel B. Morgan purchased from Machebeuf the south half of the tract, being that portion in which, as we have pointed

out above, no burials had ever occurred, and being the property now in controversy. On April 25, 1887, Machebeuf conveyed the said south half of the northeast quarter to Morgan, by a good and sufficient conveyance.

It is alleged in the amended answer that Morgan paid therefor a consideration of twenty thousand dollars ($20,000). As a further assurance of title, on May 2, 1887, the Colorado Catholic Loan and Trust Association made a further conveyance of said property to Morgan, at the instance of Machebeuf, and in view of the fact that at some time prior Machebeuf had made a conveyance of some sort to the said Loan and Trust Association. It is alleged in the amended answer that immediately thereupon Morgan took possession of all of said tract. There is no denial that immediately thereafter he proceeded to have the tract surveyed, laid it out into lots and blocks, streets and alleys, platting it under the name of Morgan's Capitol Hill Subdivision, and that on June 10, 1887, he filed the plat thereof with the county clerk and recorder of Arapahoe county, dedicating the streets and alleys of said subdivision to the public, all in full accord with the laws in such cases made and provided. The charter of the City of Denver provided that whenever any tract of land adjoining the City of Denver should be laid off into town lots, platted and duly recorded, as may be required by law, the same shall be annexed to and become a part of the City of Denver (folio 17).

Immediately thereafter the said Morgan proceeded to sell and convey portions of said tract, by the lot numbers designated upon said plat, to a large num-

ber of different parties who are named as defendants in this suit.

It is alleged in the amended answer that Morgan paid the taxes upon the said south half of the northeast quarter for the years 1888, 1889, 1890 and 1891, and that no taxes were assessed thereon for the year 1892. It is further alleged in said answer that the amount of said taxes was, in round numbers, twenty-five hundred dollars ($2,500), and included taxes levied at the instance of the City of Denver for city purposes. It further appears that neither the purchase price paid to the City of Denver by Machebeuf upon the conveyance to him, nor the taxes collected from Morgan, have ever been paid or tendered back by the city.

On January 25, 1890, and after the happening of all the events herein above receited, the Congress of the United States passed an act entitled "An act to amend an act to enable the City of Denver to purchase certain lands for cemetery purposes." This act of Congress called attention to a misdescription contained in the original act of May 21, 1872, and corrected the same. This misdescription, however, referred to a tract of land wholly distinct from that involved in this action. It was recited in this act that the City of Denver had paid for and received a patent for the land involved in this controversy, and other land, and as to the other land the former act was amended to accord with the facts and the patent theretofore issued was, by the act of 1890, approved and confirmed. It was further provided in said act "that the said City of Denver be, and it is hereby, authorized to vacate the use of the said land or any portion

thereof as a cemetery, and to appropriate the use of the same for a public park or grounds and to no other purpose" (folio 18).

On September 1, 1892, almost nineteen years after the date of the issuance of said patent and the deeding of said tract to Machebeuf, the present action was instituted by Platt Rogers, as Mayor of the City of Denver, and the City of Denver, as plaintiffs, against Samuel B. Morgan, as grantee of Machebeuf, and various other parties who held under Morgan. The action was in ejectment to recover the possession of the south half of the northeast quarter of the southeast quarter of section 2, township 4 south, range 68 west, being the tract theretofore conveyed to Morgan by Machebeuf and being the south half of the tract originally purchased by Machebeuf from Walley and conveyed to Machebeuf by the deed hereinbefore mentioned, and being that portion of the entire tract which had never been occupied with graves. Neither the City of Denver nor the Mayor thereof had ever at any time been in possession of said tract.

On January 5, 1893, the action was dismissed as to the City of Denver, by its attorneys, and the suit was thereafter prosecuted by the Mayor alone.

After much skirmishing and one trial before the Circuit Court, the defendant, Samuel B. Morgan, filed an amended verified answer on January 14, 1896 (folios 12 to 21). By stipulation it was agreed that this answer should stand as the answer for all the defendants. Later on, the said Morgan having died, it was stipulated that his heirs, Ellen Teresa Morgan et al., should be substituted and that the answer should stand as their answer as well as the answer of the

other defendants. To this answer the plaintiffs demurred upon the ground that it did not state sufficient facts to constitute a defense, and the trial court sustained the demurrer, defendants stood by their answer and judgment was rendered for the plaintiffs. Thereupon a writ of error was sued out from the Circuit Court of Appeals for the Eighth circuit, and the judgment reversed and remanded for further proceedings. The opinion of the Circuit Court of Appeals upon the reversal of said judgment will be found in 79 Federal Reporter, at page 577. The Circuit Court of Appeals held: 1. That the act of Congress of May 21, 1872, did not operate to annex any condition to the grant. 2. That the patent conveyed the land absolutely in fee and without mention of any use whatever. 3. That the act of Congress of June 25, 1890, operated to confirm and approve the said patent and beyond that had no effect upon the tract of land in controversy or the title thereto, and did not and could not annex any condition to the title or limit the use to which the land might be devoted. 4. That the patent conveyed to and vested the legal title in the City of Denver as a municipal corporation and not in Joseph E. Bates, Mayor, ~~and~~ his successors, for the reason that the grant to Bates raised a merely passive trust which was executed by the Statute of Uses. 5. That if the allegations of the answer were true the title to the land passed by the deed of the city to Machebeuf and from Machebeuf by deed to Morgan. A writ of error was sued out from this court to reverse said judgment, but was dismissed for lack of jurisdiction.

173 U. S., 702.

On remittitur from the Circuit Court of Appeals the Circuit Court, on May 15, 1899, overruled the demurrer to the answer and required plaintiff to reply in fifteen days. Johnson, then Mayor of Denver, was substituted for Platt Rogers and filed a replication. On June 20, 1899, plaintiff filed an amended replication upon which the trial was had and which will be found at folios 29 to 31. The defendants demurred to this amended replication, but the demurrer was overruled. On November 28, 1899, the case was tried to a jury and upon the conclusion thereof the jury was instructed to find for the plaintiff and a verdict was returned and judgment rendered accordingly (folios 33 and 34).

A writ of error was sued out and the cause again taken to the Circuit Court of Appeals. By the bill of exceptions it appears that the plaintiff was permitted to introduce in evidence a certified copy of the patent, although the same has been admitted in the amended answer (folio 38). Upon the introduction of the patent plaintiff's case was rested and the defendants moved the court to instruct the jury to find the issues for the defendants. The motion was denied and an exception taken (folio 39).

The defendants, on their behalf, then offered in evidence the deed from the city to Machebeuf, set forth in defendant's answer at folios 15 and 16. This deed was objected to for the following reasons: 1. Because, under the act of May 21, 1872, neither the City of Denver or its Mayor had any power or authority to convey these lands. 2. Because no ordinance or resolution of the city council of the City of Denver was shown authorizing said conveyance. 3. Because the

supposed deed did not conform to the recommendation of the committee to which the matter was sent and whose report was adopted (folio 39). The objection was sustained.

Thereupon the defendants offered the other deeds referred to in the answer and showing the chain of title to Morgan and his grantees. All of these were rejected for the reason that no title was shown in the respective grantors. The defendants thereupon renewed their motion that the court instruct the jury to find for the defendants, which motion was again denied (folio 42), and thereupon, at the request of the plaintiff, the court instructed the jury to find for the plaintiff, which was accordingly done (folio 43).

The opinion of the Circuit Court of Appeals upon its second review of the case will be found in 106 Federal Reporter, at page 453, and also in the record of this cause at folios 52 to 60.

While the case was in the Circuit Court of Appeals, Robert R. Wright, Jr., the present Mayor of the City of Denver, was substituted for Henry V. Johnson (folios 60, 61 and 62). The judgment of the Circuit Court of Appeals upon the second review of the case was that the judgment of the court below be reversed, that the defendants recover their costs, and that the case be remanded with directions to the court below to enter a judgment in favor of the defendants (folio 60).

To reverse this judgment, Robert R. Wright, Jr., as Mayor of the City of Denver, sued out the present writ of error (folios 63, 66 and 69), and the sole party now complaining of the judgment is said Robert R. Wright, Jr., as Mayor of the City of Denver.

The facts above recited are undenied and undeniable. From them it appears that nearly thirty years have elapsed since the issuance of United States patent and since conveyance of the land in controversy to Machebeuf, and nearly eleven years have elapsed since the beginning of this litigation. This cause has been three times tried in the Circuit Court; has been twice before the Circuit Court of Appeals for the Eighth circuit, and was very fully considered upon each occasion, and this is its second appearance in the Supreme Court of the United States. As was said by the Circuit Court of Appeals upon the last occasion when the cause was considered by that court:

> "This cause has now been twice before this court and we have given all phases of it our most serious attention and consideration, and the conclusions reached and settled by our deliberate judgment upon the two writs of error are that the City of Denver had the power to convey the land in controversy to Machebeuf, and that it did so. * * * The controversy has been pending between the parties for nine years, and during that time all the substantial and meritorious questions of difference between them have been settled. It would avail nothing to pursue the litigation further."
>
> 106 Federal Reporter, 458 and 459.

We submit that under the circumstances this court will not be curious to search the record for technicalities upon which to reverse the present judgment.

ARGUMENT.

I.

THE PLAINTIFF IN ERROR HAS NEITHER THE LEGAL TITLE NOR THE RIGHT OF POSSESSION.

This is an action in ejectment. The doctrine is well established that in such an action the plaintiff seeking to recover possession of land occupied by another must recover upon the strength of his own title rather than upon the weakness of his adversary's, and the burden rests upon the plaintiff to prove the title he asserts.

> "In order to recover in an ejectment suit it has long been the settled law of the federal courts that plaintiff must show a good legal title in himself and must recover, if at all, upon the strength of his own title and not upon the weakness of that of his adversary."
>
> City vs. Bigelow, 98 Fed., 242.

> "It has been long and well established as a rule of law and equity that a party must recover on the strength of his own title and not on the weakness of his adversary's title."
>
> Watts vs. Lindsey, 7 Wheaton, 161.

It is also well settled in the federal courts that the plaintiff in an action in ejectment must be clothed with a legal title to the lands in question. This rule is strictly observed and ejectment can not in the federal

courts be supported by reason of any equitable consideration.

In Sheirburn vs. Cordova, 24 Howard, 425, it was held that notwithstanding the statutes of a state making different requirements, ejectment or trespass to try title to real estate could be maintained in the United States courts only on a strict legal title.

To the same effect are:

Fenn vs. Holme, 24 Howard, 481.
Foster vs. Mora, 98 U. S., 425.
Bagnell vs. Broderich, 13 Peters, 436.
Miller vs. Courtenay, 152 U. S., 172.
Langdon vs. Sherwood, 124 U. S., 74.
Johnson vs. Christian, 128 U. S., 374.
Carter vs. Ruddy, 166 U. S., 93.

These rules being applicable, the plaintiff in error in this court can not prevail, nor can the judgment be reversed, unless such plaintiff in error be invested with the legal title, and by reason thereof be entitled to the possession of the tract in controversy.

It is important to observe that the sole plaintiff in error, and the only party now complaining of the action of the court below in any respect, is Robert R. Wright, as Mayor of the City of Denver. Suit was originally brought in the name of Rogers, the then Mayor of Denver, and the City of Denver. But four months thereafter plaintiffs' counsel dismissed as to the city, and thereafter the suit was prosecuted by the Mayor alone. Therefore, this court is not called upon, nor is it at liberty, to consider the rights of the City of Denver as a municipal corporation, but only those of its Mayor, in his official capacity.

Unless in that capacity he be invested with the legal title, and thereby with the right to the possession of the land in controversy, the judgment below can not be reversed, even though it appears that the defendants in error are likewise not invested with the legal title, for the reason that defendants in error are in possession, and no one can deprive them of that possession except by showing a better legal title.

Neither can the present plaintiff in error succeed in reversing the judgment below because of any errors committed to the prejudice of any other person or corporation, once a party to the suit. A judgment will not be reversed except for errors prejudicial to the party complaining thereof.

Neither will a judgment, however erroneous, be reversed at the instance of one having neither the title nor the right to the possession. As was said in Chittendon vs. Brewster, 2 Wall., 196:

> "But here the complainants only have appealed, and the rule is settled in the appellate court that a party not appealing can not take advantage of an error in the decree committed against himself, and also that the party appealing can not allege error in the decree against the party not appealing."

In Case vs. Kelly, 133 U. S., 21, at 29, Mr. Justice Miller employed language directly applicable to the case at bar, saying:

> "We are urged to consider that, if this decree is affirmed, dismissing the appeal of the railroad company, the defendants will be

left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is that such question can not be raised by the plaintiff in this case because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy."

In Smelting Company vs. Kemp, 104 U. S., 636, which was an action in ejectment, wherein one of the parties claimed that the tract in controversy had been erroneously patented to the other, Mr. Justice Field held that, nevertheless, the patent conveyed the legal title, and that the matters relied upon by the contestant of the patent were not available in a suit at law, saying, at page 647:

"He must resort to a court of equity for relief, and even there his complaint can not be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the circumstances of the patent, and he must possess such equities as will control the legal title in the patentee's hands. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dis-

satisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

But the Circuit Court of Appeals, when this cause was first before it for consideration, determined that the Mayor of the City of Denver had neither the legal title nor the right to the possession, nor any other interest whatsoever in the property in controversy, for the reason that the patent to the Mayor of the City of Denver, in trust for said city, imposed upon said Mayor no active duties whatever, and that, therefore, by the application of the statute of uses, which was held to be in force in the state of Colorado, both the legal title and the right to the possession immediately vested in the *cestui que trust*.

Morgan vs. Rogers, 79 Fed., 577, at 580.

And in so ruling the Circuit Court of Appeals was clearly right. The statute of uses (27 Henry VIII., chapter 10) is in force in the state of Colorado, and it has been so determined by the appellate court of that state.

Mills' Annotated Statutes, volume 2, section 4184.

Teller vs. Hill, — Colo. App., —; 72 Pac. Rep., 811 (decided June 8, 1903).

A drier and less active trust than that imposed by the terms of the conveyance to the Mayor could not readily be imagined. Not only does the instrument fail to require of the trustee the performance of any active duties, which necessitate the retention in him

of either the legal title or the possession, but it fails to require the performance of any duties of any nature whatsoever. (Folio 13.)

It has been held that the presumption is in favor of a use and against a trust, and that the use is executed, unless the application of the statute is repugnant to the manifest intent of the grantor.

> Newhall vs. Wheeler, 7 Mass., 189, at 198.
> Webster vs. Cooper, 14 Howard, 488, at 499.

Indeed, the correctness of the ruling of the Circuit Court of Appeals in this respect does not seem to be seriously challenged in this court by the plaintiff in error. The entire argument upon this branch of the case is found on pages 19 to 22 of his brief, occupying less than three pages of the thirty-six which make up the brief, and counsel close their discussion of this branch with the observation that:

> "Even if we are in error in our position with respect to the operation of the statute of uses, and it should be held that the title to the lands did pass to the municipal corporation, still and in that event the municipal corporation would take the land as a public trust for the exclusive use of the public, and not in its private and individual character."

Evidently counsel failed to recognize the fact that, even if it be true that the City of Denver took the title in trust (a position which we at all times combat and will presently discuss at greater length), yet if the city took the title at all, whether in trust or

otherwise, the present plaintiff in error has no interest in the property, and can not complain of any decisions of the court below or obtain a reversal of the judgment, even though it is shown to be erroneous to the last decree. All the remaining portion of counsel's brief, except the three pages above mentioned, is devoted to a discussion of the case upon the theory that the title was in the City of Denver, a position utterly destructive of plaintiff in error's right to maintain the present writ.

It is argued that the Mayor was invested with an active trust because of the words employed in the act of 1872:

> "To be held and used as a burial place for said city and vicinity."

We at all times deny that any trust whatever was created, and maintain that the patent conveyed a fee simple title, free from all conditions and trusts whatsoever, and this matter we shall hereinafter discuss; but, even if these words had imposed a trust, the language was not such as to impose any active duties upon the Mayor. He was not required to take any active steps or to do any particular thing in respect to the use of said tract of land, nor, indeed, could he, because, as had been averred by plaintiff in his complaint, the right to occupy and possess said lands had been at all times since the patent in the city. (Folio 3.)

By an active trust, such as will avoid the operation of the statute of uses, is meant such a trust as, by the terms of the instrument creating it, requires the performance of specific acts mentioned in said

instrument. If we adopt the construction of plaintiff in error, the most that can be said is that the property was conveyed with a charge thereon that it be used as a cemetery, and the rule is well settled that where a trust consists of realty a charge upon it of legacies or debts, or of any other nature, will not vest the legal estate in the trustees unless the instrument creating the trust contains some direction to them to raise money for the payment of the charge, or unless it contains some requirement to execute an active trust.

2 Leach on Trusts and Trustees, page 926, section 398.

In many cases where the trust instrument was much more definite in respect to the active duties to be performed by the trustee than in the case at bar, even adopting the position of plaintiff in error, it has been held that the statute applied and the legal title with the right to the possession vested in the *cestui que trust.*

In O'Meiia vs. Mullarky, 124 Ill., 506, a deed conveyed land to the trustee in trust for the heirs of a certain person, the title to vest absolutely in fee simple in said heirs at and after the death of the uncle of said heirs; "but to so vest upon, and only upon, the express condition that the said uncle shall, during the whole remaining term of his natural life, have a home upon said lands and a good and sufficient support therefrom, and also the control and management thereof." Notwithstanding the requirements as to the manner in which the estate should be used, it was held that the statute of uses applied and that the legal title vested in the *cestui que trust.*

In Burke vs. Valentine, 52 Barb., 412, a testator directed by his will that a certain portion of his estate should remain in the hands of his executors, or under their control for the use of his wife and children while under age, and that after the youngest child should arrive at the age of twenty-one the same should be divided among his children, share and share alike. It was held that no legal title remained in the trustees, but that it passed directly to the wife and children.

To the same effect are:

Ramsay vs. de Remer, 65 Hun., 212; 20 N. Y. Sup., 143.

Reeves vs. Bratcn, 36 S. C., 38; 15 S. E., 658.

Robinson vs. Austindorf, 38 S. C., 66; 16 S. E., 371.

Hannig vs. Mueller, 82 Wis., 235; 52 N. W., 98.

Everts vs. Everts, 80 Mich., 222; 45 N. W., 88.

The fact that the possession and the right to the possession immediately vested in the City of Denver (as is alleged in the complaint, folio 3) is sufficient to show that whatever legal title passed by the patent likewise vested in the city; for without the possession, or right to the possession, the Mayor could in no wise control the use to which the property was put.

Wainright vs. Lowe, 132 N. Y., 313.

"If the trust is a simple or passive one, to allow the beneficiary to keep and enjoy the

estate, the trustee has no power or duty to perform."

2 Perry on Trusts (3d Ed.), section 475.

Even if we adopt plaintiff in error's position and import into the patent the language of the act of 1872, as construed by plaintiff in error, the patent would read that the lands were conveyed "to the Mayor for the use of the City of Denver for the use of the inhabitants of said city and vicinity as a burial place."

In that event we should have a use limited upon a use. The statute would execute the first use, thus reposing the trust, if any, in the City of Denver, and we should have a case such as Lord Hardwick referred to when he said:

> "A statute introduced in a solemn and pompous manner has had no other effect than to add, at most, three words to a conveyance."
>
> Hopkins vs. Hopkins, 1 Atk., 591.
>
> Croxall vs. Shererd, 5 Wall., 268, at 282.

In that event, even though it were an active trust, the City of Denver, as a municipality, would be the trustee, and the Mayor of said city in his official capacity, and especially the present Mayor, successor to the original grantee after an interval of thirty years, would be a stranger to the title.

But the plaintiff in error contends that the legal title could not have vested in the city for three rea-

sons. We shall discuss these reasons in the order in which they are advanced in the brief.

It is first maintained that, because the act of 1872 stated that the land was conveyed to be held and used as a burial place for said city and vicinity, therefore a trust was established, not only for the inhabitants of Denver, but also for those living in the vicinity thereof, and that the city itself could not serve as trustee of such a trust for the reason that a municipal corporation can not serve as trustee in purely private trusts. Our reply to this contention is that the language herein above quoted from the act of 1872 did not and was not intended by Congress either to create any trust or add any condition to the grant. It was a mere statement of the motive which actuated Congress in giving the somewhat unusual authority conferred by said act, and it was so understood by the officers of the land department, for, in issuing the patent, they did not insert therein said language, or any part thereof, the patent being to the Mayor of the City of Denver, in trust for said city, without mention of cemetery or other purpose, and without stating that the land was to be used by the inhabitants of said city or by those living in the vicinity thereof, or by either or both. We submit that the officers of the land department were clearly correct in the construction which they placed upon the act of 1872, and that the patent issued was precisely such as the act contemplated. But if both the officers of the land department, the Circuit Court of Appeals and ourselves are mistaken in this view, nevertheless, it must be conceded that the patent issued conveyed the legal title, in the manner, to the extent and to the persons

named in said patent. If, by mistake or inadvertence upon the part of the officers of the land department, the land was conveyed to one person when it should have been conveyed to another, or was conveyed to one person when it should have been conveyed to that person and another, nevertheless the legal title passed thereby to the grantee and the patent is and was exempt from attack in an action of ejectment on that account. If the rights of any one were prejudiced by such a patent, or if the patent conveyed lands in fraud of the United States, the remedy lies in a direct proceeding, either by the United States or by the party to whom the title should have gone.

A patent carries the fee and is the best title known to a court of law.

This proposition is sustained by an unbroken current of authority:

Bernier vs. Bernier, 147 U. S., 242.

Cowell vs. Springs Co., 100 U. S., 55.

Smelting Company vs. Kemp, 104 U. S., 636.

Hooper vs. Scheimer, 23 Howard, 235.

Johnson vs, Towsley, 13 Wall., 72.

Gibson vs. Chouteau, 13 Wall., 92.

But, even if the officers of the land department exceeded their authority in conveying the land without mention of the purpose to which it was to be devoted and without stating that it was intended not only for the inhabitants of the City of Denver, but also for the inhabitants of the vicinity thereof, yet their act in so doing was subsequently fully ratified

and confirmed, and the time is now long passed for the raising of any such question.

The title of the act of 1872 indicated the purpose of Congress to enable the City of Denver to purchase said lands. (Folio 12.)

On January 25, 1890, the Congress of the United States, for the purpose of correcting a misdescription in the original act, passed an act entitled "An act to amend an act to enable the City of Denver to purchase certain land for cemetery purposes," wherein the fact of said erroneous description was recited and it was further recited that the City of Denver had paid for and received a patent for certain lands, as described in said patent, and enacting, among other things, that said patent issued on November 15, 1873, be and the same thereby was approved and confirmed. (Folio 18.)

It is clear that the Congress of the United States could and did ratify and confirm the acts of its agents in making and issuing the patent in the form in which it was made and issued, and it is equally clear, as was held by the Circuit Court of Appeals, that the Congress of the United States could not, after the making of the grant, and that the act of 1890 did not operate to, annex any condition thereto or create any trust. The principle that subsequent ratification is equivalent to original authority, applies to the agents of government as well as to other agents. Since, therefore, the government officials were authorized to and did made a patent to the Mayor of the City of Denver, in trust for the city, no trust was created in favor of the inhabitants of the vicinity of said city. Moreover, this was the position taken by the plaintiff in error at the inception of his present suit, for in

his complaint it is alleged that ever since the issuance of said patent the City of Denver had been and was entitled to occupy and possess said lands so conveyed, no mention being made of those residing in the vicinity. (Folio 3.) But, even if the language of the act of 1872 is to be imported into the patent, and even if thereby a trust is created in favor of the inhabitants of the city, and also in favor of those living in the vicinity thereof (a position which we at all times combat), yet the City of Denver had full authority to accept and execute a trust of that character, and so the argument of plaintiff in error in that respect must fall to the ground. It is urged by plaintiff in error that such a trust would be a private trust, and that a municipal corporation can not administer a trust of that character for the benefit of persons residing outside of its limits, particularly when the trust property also is situated without its limits; but the trust, if trust there was, was for the inhabitants of the city as well as those of the vicinity, and the argument last mentioned is utterly destructive of the position assumed by plaintiff in error throughout the discussion, namely, that the trust, if any there was, was a trust of property for cemetery purposes, and therefore a public trust. Plaintiff in error cites certain text writers in support of his position, but the section of Dillon on Municipal Corporations (section 555) cited in this connection fails to sustain his argument, for the author there says:

> "That there are purposes for which such such a corporation may, without special

grant, purchase and hold extra territorial lands, as for a pest house, cemetery and the like objects of a municipal character."

Moreover, by the charter of the city, as it then stood, the city possessed plenary power to purchase, hold, possess and enjoy property beyond its limits for burying grounds and cemeteries (folio 17), and by many decisions of this court it has been held that a municipal corporation may take and administer a trust for purposes germane to the objects of the corporation, or which will promote, aid or assist in carrying out or perfecting those objects, and this is true although the trust property may be situated beyond the corporate limits and the *cestuis que* trustent may be other than the inhabitants of said city.

Dillon on Municipal Corporations (4th Ed.), sections 557, etc.

Vidal vs. Gerard's Executors, 2 Howard, 127.

McDonogh Will Case, 15 Howard, 367.

Perin vs. Carey, 24 Howard, 465.

Chambers vs. St. Louis, 29 Mo., 543.

And this interpretation has been placed upon the present charter of the City of Denver, which, in this respect, is practically the same as it was in 1873, by the Supreme Court of the state of Colorado.

Clayton vs. Hallett, — Colo., ——; 70 Pac., 429.

The next objection urged by plaintiff in error against the vesting of the legal title in the municipal-

ity is that while at the date of the patent the city had the right to take property for cemetery purposes outside of the corporate limits, yet Congress well knew that the legislature might at any time take away such authority. Counsel here shies at a shadow. If the municipality had authority to take such land at the time when the grant was made that is sufficient. It is idle to contend that any act of the legislature passed subsequent to such grant could divest said title or in any way impair vested rights, even should it attempt so to do. This proposition is firmly bottomed upon the elementary and unchangeable principles instilled into the mind of the student of law at the very beginning of his legal education.

The third and last reason advanced by plaintiff in error to maintain his position that the legal title could not vest in the city, is that the City of Denver had no power to hold lands outside of the city limits for purposes other than a cemetery, therefore, if Joseph E. Bates, as Mayor, took the title free from any trust except a passive one, the legal title did not and could not pass to his *cestui que trust*, the City of Denver. We must confess that we are absolutely unable to follow counsel's reasoning at this point. After giving the argument careful consideration, it seems to us and we submit that it clearly is, a most complete *non sequitur*.

By the provisions of the charter, quoted at folio 18 of the record, the city had ample power to purchase, hold, possess and enjoy real and personal property for city hall, jail, public grounds and *for other public purposes*, and to sell and convey the same, and also had power to purchase, hold, possess and enjoy real

property beyond the limits of the city for burying grounds and cemeteries. Since its power to purchase land outside the city limits for this purpose was full and complete, it mattered not in what manner the city exercised that power. If the city had purchased such lands outside its limits from a private person, could any possible question have been raised as to its authority so to do? How, then, can any such question be raised when a similar purchase for the same purpose is made by the city from the general government? And what difference does it make that the city, instead of entering and paying for the lands directly in its own name, did so through its Mayor as trustee for the municipality, such being the procedure provided for by the Congress of the United States and such being the usual procedure where a grant is made to a municipal corporation, as evidenced by the townsite grants and other grants of like nature? If the Mayor for and in behalf of the city and as its trustee entered the lands for the purpose aforesaid and paid for the same with the city's money, and if the city was authorized to purchase such lands for such purposes, by what method of reasoning can the conclusion be reached that it makes any difference in law whether the title is conveyed directly to the city by a deed or patent running to it in its corporate name or whether such title reaches it by the operation of the Statute of Uses through its Mayor, who acts as the trustee, agent and instrument of the city for that precise purpose? We submit that in the present argument counsel indulges in a refinement of reasoning which is not only beyond our ability to grasp, but which has no foundation in logic.

It might well be true and it is true that Joseph E. Bates, as Mayor, took the title to the said lands as trustee for the City of Denver and that the purpose of the City of Denver in purchasing said lands was to use them as a burial place, and nevertheless it might at the same time be true and it is true that Joseph E. Bates took merely a passive trust for said city, that he was not required by the terms of the instrument or otherwise to perform any active duties whatsoever or to do anything other than act as the instrument of the city in obtaining the title, and that neither he nor his successors have had either the possession or the right to the possession of the lands conveyed (folio 3).

But, if the Circuit Court of Appeals was altogether in error in holding that the Statute of Uses applied and that the legal title was vested in the City of Denver, yet the present plaintiff in error is in no position, and he will not be permitted, to say so. The ruling that the Statute of Uses applied was made by the Circuit Court of Appeals when this cause was first before it for consideration.

Morgan vs. Rogers, 79 Federal, 577.

The result of that decision was a reversal of the judgment of the Circuit Court and a return of the cause for a new trial. Upon said new trial plaintiff in error and his counsel acquiesced completely in said ruling of the Circuit Court of Appeals and tried said cause upon the theory that the legal title was vested in the City of Denver as a municipal corporation.

At said trial the plaintiff in error introduced the patent and then rested (folio 38). The defendants in error, on their behalf, offered in evidence the deed of

the City of Denver to Machebeuf, which is set forth at folios 27 and 28. To the introduction of this deed the plaintiff in error, by his counsel, objected for the following reasons:

1. That the City of Denver and its Mayor were without power or authority to convey the lands.

2. That there was no ordinance or resolution of the city council authorizing said conveyance; and,

3. That the deed does not conform to the recommendation of the committee, to which the matter was sent and whose report was adopted.

It will be observed that there is no objection to the deed upon the ground that the grantor named therein had no title, nor upon the ground that the title was vested in the Mayor of the City of Denver, and not in the city. The view evidently taken by counsel was that the title was in the city, but that the city was without authority to convey, and, even if it had the authority so to do, had not pursued the necessary forms (folio 39). This was the determining point of the trial, for the remaining muniments of title offered by the defendants in error were excluded upon the ground that the respective grantors had no title for the reason that they claimed to derive title from Machebeuf, the grantee in said original deed, and thereupon the jury was instructed to return a verdict for plaintiff in error. But, to make the position of plaintiff in error still more difficult in this respect, it is only necessary to refer to the proceedings in the Circuit Court of Appeals when the cause reached that court for the second time, resulting in the judgment, to reverse which the present writ of error is prosecuted. In the brief filed by the plaintiff in error in

that court upon that occasion, it is said on page 12 thereof:

> "It is respectfully submitted that no question of condition annexed to a deed is raised in this case, but that the words declaring the use to which the land should be put make a trust and confidence reposed in the City of Denver by the Congress, and that the land can not be diverted from the purpose declared without the consent of the trustor. It is true, the use declared in the patent is to the City of Denver, but the statute shows that it was not to the City of Denver in its private capacity, but to the city as a naked depository of the title to be held for the people of the City of Denver and vicinity for a burial ground. *We think it true that the Statute of Uses vested the legal title in the city*, but it was the mere legal title; the use was in the public."

Plaintiff in error could not more clearly state his acquiescence in the ruling that the statute of uses applied and that the legal title was vested in the City of Denver, nor could he, by any use of the English language with which we are familiar, more clearly state himself out of court, because, as we have shown, if the legal title became vested in the city as a municipal corporation, the Mayor of said City and his successors lost all connection with said title and could not maintain an action of ejectment, whether said City took said title as an absolute fee without condition or trust or whether it took it upon condition or in trust for uses declared.

We know of no proposition which is better settled than that the theory of the action which was adopted by the trial court or by an intermediate appellate court, with the acquiescence of the parties will govern in the final appellate court, for the purposes of review. When parties consent to the trial of their case upon a certain theory of what the law is, though it be erroneous, they can not complain of a result which is correct according to that theory, and, in order to ascertain what the theory was, the appellate court will consider the form of objections to the evidence.

Mathews vs. Mathews, 133 N. Y., 679.

The statements of counsel on the trial.

Moquist vs. Chapel, 62 Minn., 258.
Lockwood vs. Quackenbush, 83 N. Y., 607.
Oscanyan vs. Arms Co., 103 U. S., 261.

The statements in the briefs filed or arguments made on appeal.

Kenney vs. Wells, 23 Ind. App., 490.
Holman vs. Boston Land Co., 8 Colo. App., 286.

In speaking of the rule, an eminent writer says:

"The rule under discussion is no more than the application of the familiar doctrine of election, which is itself founded in the old adage that 'a man can not blow both hot and cold,' and hence there is nothing novel in it. The rule is one required by logic and prac-

tical considerations, since, without it, inconsistent positions might be assumed without any other restraint than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, inasmuch as its principal purpose is to prevent deception, since, without it, parties might mislead their adversaries by assuming one position in the trial court and another on appeal. Nor could there be an orderly administration of justice without such a rule."

Elliott on Appellate Procedure, section 496, also sections 489, 490 and 492.

In the case of Union Pacific Railroad Company vs. C., R. I. & P. Ry. Co., 163 U. S., 568, at 593, Mr. Chief Justice Fuller, in delivering the opinion of the court, stated that, in considering a case brought by appeal or writ of error to this court from the Circuit Court of Appeals, this court has to determine only, whether, in the judgment of this court, the Circuit Court of Appeals did or did not err, and affirm or reverse accordingly, and that, therefore, the judgments of the courts of appeals should not ordinarily be re-examined on a suggestion of error in that court, in that it did not hold action of the Circuit Court erroneous which was not complained of. This being true, a fortiori, the judgment of the Circuit Court of Appeals should not be reversed upon a suggestion of error in respect to a legal proposition advanced and assented to in that court by the present plaintiff in error. Certainly the Circuit Court of Appeals was

not in error in adopting the construction placed upon the grant by plaintiff in error himself, and, if its decision is correct upon the theory so assented to, such judgment can not be reversed for the reason that the legal proposition thus agreed upon was in itself erroneous. If error was committed it was so done with the consent and by the procurement of plaintiff in error.

Heimburg vs. Manhattan Ry. Co., 162 N. Y., 352.

Snyder vs. Snyder, 160 N. Y., 151.

Stapenhorst vs. Wolf, 65 N. Y., 596.

Geneva Ry. Co. vs. N. Y. Central, 163 N. Y., 228.

"When parties consent to try their case upon a certain theory of what the law is, though it be erroneous, they can not complain at the result if it be correct according to that theory."

Davis vs. Jacoby, 54 Minn., 146; 55 N. W., 908.

Detroit Motor Co. vs. Bank, 111 Mich., 417.

Graham vs. Nowlin, 54 Ind., 389.

"Counsel will not be permitted to invite error on the trial and then assign such error for the reversal of the judgment."

Guntley vs. Staed, 77 Mo. App., 155.

Douglass vs. Kansas City, 147 Mo., 428.

Rucker vs. Smelting Co., —— Colo. App., ——; 72 Pac. Rep., 682.

> "A party will not be allowed to try his case on one theory in the court below, and then, if beaten there, on ground of his own choosing, spring a fresh theory on his adversary in this court."
>
> Bray vs. Seligman, 75 Mo., 31, at 40.

When, in the lower court, plaintiff's theory is a right of recovery as assignee, he can not, on appeal, contend for a right to recover otherwise than as assignee.

> Home Insurance Co. vs. Transportation Co., 51 N. Y., 93.

Authorities upon this proposition might be multiplied indefinitely, but those cited sufficiently show that the rules we have stated above are sustained by a current of authority which, so far as our investigation has disclosed, is unruffled, and we, therefore, submit that plaintiff in error, having tried his case both in the Circuit Court of Appeals and in the Circuit Court, upon the theory that, by operation of the statute of uses the legal title vested in the City of Denver, and, having been beaten upon that theory, can not now shift his position and secure a reversal of the judgment upon the theory that the statute of uses did not so operate.

From the foregoing discussion we conclude and submit it to be established beyond question that the present plaintiff in error can not, under any circumstances, secure a reversal of the judgment of the Circuit Court of Appeals for the reason that he has not and never had any interest in the subject-matter of

the controversy; that he has not and never had either the legal title or the right to the possession, and that, therefore, he was not and could not have been prejudiced by any action of the court below, however erroneous the same may have been.

II.

THE PATENT CONVEYED AN UNQUALIFIED FEE WITHOUT CONDITION OR TRUST.

But, even if the proper party were here complaining, still the judgment below must be affirmed, for the reason that the contentions of the plaintiff in error that the grant was made either upon condition or subject to a trust of some character are without foundation. There is no question, and there can be none, that the patent conveyed the fee, nor is it anywhere contended, nor could it be successfully maintained, that the patent is void. It has been settled by the determinations of this court that a patent is to be construed and interpreted by the same rules governing other written instruments conveying title.

Brown vs. Huger, 21 Howard, 305, at 318.

Gazzan vs. Phillips, 20 Howard, 372, at 376.

Plaintiff in error cites Leavenworth Railroad vs. U. S., 92 U. S., 733, and Lake Superior Ship Canal vs. Cunningham, 155 U. S., 354, for the purpose of showing that the grant is to be construed in a sense most favorable to the grantor.

The principle is not applicable to the present case and counsel are led into the error of attempting to apply it by reason of the fact that they evidently confuse the rules applicable to the sale of the public lands made upon a valuable consideration paid therefor by the purchaser, with a free grant or donation of the public lands made without any consideration therefor whatever. The two cases last above mentioned are cases of donations of land by the general government for specific purposes and in one of them at least the grant contained an express condition subsequent, in definite and unmistakable language, with a provision that the title revert in case of misuser. These rules are absolutely inapplicable to a case such as is the one at bar, wherein the public lands have been purchased and paid for and the conveyance thereof has been made upon such valuable consideration. The rule is well settled that when a consideration is paid for the grant, the instrument of conveyance, whether it be a patent or a deed, is to be construed most strongly against the grantor, even though the grant be of the public domain and by the sovereign.

In Charles River Bridge vs. Warren Bridge, 7 Pickering, 344, it is said, citing Bacon's Abridgment, Prerog. F. 2:

> "When the king's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the king."

In the same case in the United States Supreme Court (reported in 11 Peters, at 420) it is held by Mr.

Justice McLean, at page 557, that grants obtained on consideration are liberally construed in favor of the grantee, and the same rule is laid down by Mr. Justice Story at page 589, where he says that the rule of strict construction in favor of the sovereign never did apply to grants made for a valuable consideration.

In 3 Washburn on Real Property (3d Ed.), 173, the learned author says:

> "This strictness of construction in favor of the sovereign and against the subject applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant, nor, as it seems, is the rule available where the grant is for a valuable consideration. In such case the rule of construction between the government and the subject is the same as between private grantors and grantees."

Applying these rules to the patent under consideration it becomes clear that the contentions of counsel can not be maintained. The act of Congress of 1872 is not and was not intended to be a grant. It is nothing more than an authorization to the officials of the land department directing them to permit a municipal corporation to enter, pay for, purchase and receive the conveyance of certain public lands.

It is perfectly clear that the language of said act: "as a burial place for said city and vicinity," was inserted for no other purpose than to assign a reason for selling public lands to a municipal corporation, a proceeding which can hardly be said to have been of every day occurrence. There can be no doubt that the

act of 1872 answered the purpose for which it was intended and conferred upon the proper officials full power to sell and convey the land described to the City of Denver. Thereupon the City of Denver, through its Mayor, entered, purchased and paid for the land and received the conveyance of the government in the form of a patent containing no limitation, restriction or burden upon the fee conveyed thereby. The land conveyed was public land, it was within the jurisdiction of the land department to convey it and the instrument executed and delivered was sufficient for that purpose. If, by inadvertence or mistake of the officials of the land department, a conveyance was made to the wrong person or of different property or of a different estate or title than was intended to be or ought to have been conveyed, the question is one which can not be raised in an action of ejectment, wherein the strict legal title prevails and equitable considerations are inadmissible.

In Bernier vs. Bernier, 147 U. S., 242, the patent ran to the minor heirs of the entryman when it should have run to all his heirs at law, both minors and adults. The court held that a decree was necessary, that the minor heirs hold the title in trust for the adult heirs in proportion to their interests.

In Brown vs. Huger, 21 Howard, 305, the patent having been made to a grantee differing in name from the maker of the original entry, it was held that in an action of ejectment no reference could be made to the steps preceding the patent, that the patent itself must be taken as evidence of its meaning and that it could not be altered by evidence aliunde, but that the legal title conveyed by the patent and derived from

the construction of the language of the patent itself must prevail in an action of ejectment.

In Gazzan vs. Phillips, 20 Howard, 372, an action in ejectment, it was held that the rights of the parties must be controlled by the language of the patent and resort can not be had to any supposed original equity arising under the pre-emption laws, the court saying, on page 376:

> "We deny altogether the right of the court in this action to go beyond these terms, thus explicit and specific, and under a supposed equity in favor of Etheridge, arising out of the pre-emption laws, to the whole of the southwest quarter, enlarge the description in the grant, or, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity instead of by the description in the patent."

If it be true that, in an action of ejectment, the court will not go outside the patent to enlarge the premises or the title conveyed, by the same reasoning must it be true that the court will not go outside the patent for the purpose of diminishing either the premises or the quality of the title conveyed.

In Niles vs. Cedar Point Club, 175 U. S., 300, Mr. Justice Brewer held, on page 308, that although the land might be of such character that it should have passed to the state of Ohio under the swamp land act, neverthless the land department treated it as land subject to its control as public land of the United States, and had it surveyed, sold and patented, and

that the legal title passed to the patentee and to his grantees.

The dignity, importance and practical unassailability, even in an action in equity, of a patent of the United States is demonstrated by frequent decisions of this court.

Colo. Coal Co. vs. U. S., 123 U. S., 307.
U. S. vs. Northern Pacific, 95 Fed., 864.
U. S. vs. Northern Pacific, 177 U. S., 435.

And it has always been held that a patent carries the fee, and is the best title known to a court of law.

Gibson vs. Chouteau, 13 Wallace, 92.
Johnson vs. Towsley, 13 Wallace, 72.
Cooper vs. Scheimer, 23 Howard, 235.
Cowell vs. Springs Co., 100 U. S., 55.
Smelting Co. vs. Kemp, 104 U. S., 636.

Even if it could be successfully maintained (which it can not) that the land department did not comply strictly with the authority conferred by the act of 1872, in that said department sold and conveyed an unqualified fee thereof, yet such contention is now quite unavailing, for the reason that the act of the land department in that regard was subsequently and before the bringing of this suit fully ratified and confirmed. That the language of the act of 1890 was sufficient for that purpose is evident without discussion (folio 18); that it had such effect can not be doubted.

U. S. vs. Des Moines River Navigation Co.,
43 Fed., 1.

That it could and did have no effect beyond the confirmation of the conveyance, both in respect to the description of the land and also in respect to the quality of the estate conveyed, can not be doubted, and it is equally clear that said act of 1890 could not, and did not, operate to annex any condition to the grant already made.

The land involved in the present action was no part of that, the description of which it was necessary to correct, but the tract involved in the case at bar was correctly described in the original act and in the original patent.

The United States, having made a grant of an unqualified fee in the first instance, could not, after the lapse of a great number of years, and certainly not after the intervention of the rights of innocent purchasers such as Machebeuf, Morgan and their grantees are, change the grant, merely by an act of its legislative department, to one upon condition or in trust.

The cases heretofore cited sufficiently demonstrate that, by the patent, the government parted with its title to the land. It is clear, therefore, that in this case the question arises between the alleged grantee of the city and the city itself, and that from the date of the patent, November 15, 1873, the government has had no interest, and, however this question may now be decided, the government would have no interest in the property. It must go either to the plaintiff or defendants in this case, without any further compensation to the government.

The case thus carries with it the decision of the Supreme Court of the United States, in U. S. vs. San Jacinto Tin Co., 125 U. S., 273, wherein it was held that the government in such a case had no interest in

the matter, and could not bring suit to set aside a patent to the lands, once issued, for want of a sufficient interest. Now, if that be true, then *a fortiori* must it be true that the legislative department could not, on the same ground and for the same reason, legislate the land out of one party into another. If the patent was good when issued, no subsequent act of Congress could make it bad, much less take away the rights acquired by an innocent purchaser in good faith by purchase from the city or its grantee.

U. S. vs. Minor, 114 U. S., 233.

In Moore vs. Robins, 96 U. S., 530, it is held that, after a patent is issued and accepted by the grantee, all control, even by the executive department, ceases, and that such patent passes the legal title to the grantee.

To the same effect are:

Widdicombe vs. Childers, 124 U. S., 401, at 405.

Smelting Co. vs. Kemp, 104 U. S., 636, at 647.

Nor do the words "in trust," in the patent, reserve any right to the government or give it any control over the property. That point was expressly decided in Cowell vs. Colorado Springs, 100 U. S., 55. Such being the law, it is clear that the rights of the defendants herein are not in any measure diminished by the act of Congress of January, 1890.

Mead vs. Ballard, 7 Wallace, 290.

Tex. Ry. vs. Marshall, 136 U. S., 393, 403.

Berkley vs. U. P., 33 Fed., 794.

Iron Co. vs. Erie, 41 Pa. St., 341.

But, even if the words "as a burial place for said city and vicinity" could be imported into the patent, and even if the patent must be read as though said words were incorporated therein, yet it is clear that these words simply declare the purpose or occasion of the grant, and have not the effect of qualifying or limiting the estate in fee expressly granted by the patent, or attaching thereto any conditions or burdens whatsoever. There can be no doubt that the city was fully authorized by its charter to acquire lands beyond the city limits by purchase or otherwise for burying grounds and cemeteries, and it is equally clear that, having acquired such lands, the city was also authorized to sell and convey the same, particularly when it had never taken possession thereof, had never made use of the same, either for a burying ground or for any purpose, and when, as to the particular ground in controversy here, no interments had been, or ever were, made therein, either by the authority of the city or otherwise.

Section 4 of the charter, as it then stood, provided that the city should have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and *for other public purposes*, and should have power and authority to sell and convey the same, and might also purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same. And section 5 of the charter further provided that said city should have power and authority, and was thereby empowered and authorized to take, hold, possess, use and enjoy both real and personal property by deed, grant, gift, be-

quest, devise or otherwise, and that it should have the power through and by the city council to sell and convey the same for the sole use and benefit of the inhabitants of said city. (Folio 17.)

Some argument is attempted to be made that the city had not the power to alienate lands acquired for cemetery purposes, for the reason that the language giving the power of alienation, although used in the same section, was not placed in immediate juxtaposition with the words granting the power to acquire lands for cemetery purposes; but it is ridiculous to suppose that the legislature intended to make any distinction between lands acquired for cemetery purposes and lands acquired for other public purposes in respect to the power of alienation. It might very well be true, and in the present case it is true, that the city, having acquired lands for cemetery purposes, might find them unavailable for that purpose, or might discover that it had purchased more land than was required for that purpose, or might determine that some site other than the one purchased was better adapted for the purposes of a cemetery. In such event could it be maintained with any show of reason that the city had not the power to dispose of the lands already acquired, in order that the newly arisen conditions above mentioned might be met? We submit it to be clearly the intention of the legislature, when it gave the city power to dispose of lands acquired for "other public purposes," to include therein lands acquired for cemetery purposes.

An *argumentum ad hominem* is attempted to be built up, based upon the premise that neither the legislature of the state nor the Congress of the United

States intended to permit the city to alienate the lands conveyed for cemetery purposes, because a burial place is God's acre, and the alienation of the lands would result in the desecration of the graves, but this argument is wholly inapplicable to the case at bar, for the reason that the city never took possession of the tract which it conveyed to Machebeuf; no interments were ever made therein by the authority of the city, and for the further reason that, of the forty acres conveyed to Machebeuf, twenty acres thereof had been used for many years prior to the said conveyance as a burial place for members of the Catholic church, of which Machebeuf was bishop, and continued to be so used for many years after the conveyance, until about the year 1887, when burials therein were forbidden, and that, as to the other twenty acres, which constitute the land involved in the present controversy, no interments of any character were ever made therein, either under the authority of the Catholic church or under the authority of the City of Denver, or at all.

The city purchased this land for cemetery purposes, but found it unavailable for that purpose for the reason that Machebeuf, representing the Catholic church, had prior rights thereto as a burial place for members of said church, such rights dating back as far as the year 1863. For this reason the rights of the city therein were relinquished and conveyed to Machebeuf upon his paying therefor a consideration of not less than fifty dollars ($50) and probably all of the expenses to which the City of Denver had been put in obtaining government title. (Folios 14, 15 and 16.)

The right and power of the City of Denver to make this conveyance is fully established by the provisions of its charter above quoted. The fact that the power to alienate is not expressed in immediate conjunction with the power to acquire lands for cemetery purposes is of no significance. What is implied in a statute is as much a part of it as what is expressed.

> Thurber vs. Miller, 67 Federal, 371, at 376.
>
> U. S. vs. Babbit, 1 Black, 61.
>
> Gelpcke vs. Dubuque, 1 Wallace, 221.
>
> Wilson Co. vs. Third National Bank, 103 U. S., 770.

Even if the language employed in the act of 1872 had been incorporated into the patent, it is thoroughly well settled that nevertheless the patent would have conveyed an unqualified fee, without condition, limitation, covenant or trust.

In the case of Stuart vs. Easton, 170 U. S., 383, this court had under consideration a patent to lands, the language of which was in substance:

> "in trust, nevertheless, to and for the erection thereon of a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever."

It will be immediately perceived that this language is much more stringent and specific than the language in the case at bar, yet this court held that the estate conveyed was an unqualified fee, without

condition or limitation, and in the discussion of the subject Mr. Justice White cited with approval, among many other cases, the case of Slegel vs. Lauer, 148 Pa. St., 236, wherein it was said:

> "Of course the mere expression of a purpose will not of and by itself debase a fee."

Also, the case of Kerlin vs. Campbell, 15 Pa. St., 500, wherein a grant in fee simple, to the county commissioners, of land "for the use of the inhabitants of Delaware county, to accommodate the public service of the county," was held not to create a base fee.

Also, the case of Seebold vs. Shitler, 34 Pa. St., 133, in which it was held that a grant to the county commissioners and their successors in office of a tract of land, with a brick court house thereon erected, "in trust for the use of said county in fee simple," conveyed an unqualified fee.

Also, the case of Packard vs. Ames, 16 Gray, 327, wherein it was said:

> "We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be upon condition."

In Commissioners vs. Young, 59 Fed., 96, the Circuit Court of Appeals for the sixth circuit announced it to be a rule supported by an overwhelming weight of authority that the mere expression of a purpose, or a particular use to which property is to be appropriated, will not make the estate a conditional one,

and on page 105 a large number of cases are cited to sustain the conclusion.

To the same effect are:

Rawson vs. School District, 7 Allen, 125.

Portland vs. Terwilliger, 16 Ore., 465; 19 Pac. Rep., 90.

Stone vs. Houghton, 139 Mass., 175.

Ayer vs. Emery, 14 Allen, 67.

Sohier vs. Trinity Church, 109 Mass., 1.

Episcopal Mission vs. Appleton, 117 Mass., 326.

Farnham vs. Thompson, 34 Minn., 330.

Taylor vs. Binford, 37 Ohio St., 262.

Carter vs. Braun, 79 Ind., 14.

Brown vs. Caldwell, 23 W. Va., 187.

Thornton vs. Trammell, 39 Ga., 202.

From these authorities it follows, also, that there was no dedication of the property to the public use in such sense as to render the property inalienable by the City of Denver; for, to permit the grant so to operate, would be to impose a burden upon the fee, to attach thereto a qualification, and in the cases above cited it is held by the various courts, including this court, that similar and even stronger language contained in the grant will not be permitted to qualify the fee in any respect.

Under the facts appearing in the case at bar, it is impossible to hold that there was a dedication. The primary idea of a dedication is that there is a gift or donation upon the part of the dedicator. It is clear,

therefore, that there was no dedication by the United States in making this grant, for the reason that the grant was not a donation, but was a sale of the property at the usual government price. It is contended by counsel that there was to some extent a donation for the reason that the government exacted the minimum price, whereas it might have had the maximum price, because the lands were within the place limits of a certain railroad grant. It is to be observed that counsel travels completely outside of the record in making this statement, but, even if it were true, it would have no effect upon the principle which we have invoked, for the reason that, in such cases, the inquiry is not whether the consideration paid was fuly adequate, but whether the grant was made by the dedicator as a pure donation, gift or gratuity.

The subject is fully discussed in Commissioners vs. Young, herein above cited, and in many other cases cited herein in this connection.

That there was no dedication is also evident for another reason, which is that the use of the property involved in the present controversy as a public cemetery was never, at any time, accepted, either by the City of Denver or by the inhabitants of said city or its vicinity. It is thoroughly well settled that a dedication does not take effect until there has been an acceptance of the use by the public, and in the present case not only is there no evidence of an acceptance of the use, but, on the contrary, the undisputed facts completely negative any such acceptance. As to the forty-acre tract conveyed to Machebeuf, of which the property in controversy is a part, it appears that it was never, at any time, either before or after the government patent, used as a public cemetery. Only a

part thereof, and that not the part involved in this suit, was used as a cemetery at all, and it was used, not by the public generally, but only by the Catholic church. Neither the city nor the general public ever, at any time, took possession of the tract, or any part thereof; but since 1863 and up to the time of the conveyance to Morgan in 1887, the possession was in Machebeuf for the Catholic church. The City of Denver recognized the prior rights of Machebeuf and almost immediately after receiving the patent, and without in any way attempting to take possession of the tract, conveyed whatever right to the property it had acquired by deed to Machebeuf and, during the entire period, the tract was used, not by the public, but by Machebeuf and the Catholic church, as a place of interment for the members of said church and not as a burial place for the public generally, and this use continued until, first by public clamor and afterwards by ordinance and by orders of the board of health, burials in that place were forbidden by the City of Denver, whereupon Machebeuf conveyed the property here in controversy to Morgan. It, therefore, appears, not only that the city and its inhabitants never took possession of the tract, or used it for a cemetery, but that, before they had ever done so, the city conveyed it away and thereafter and also before such use had ever been begun, the city, by ordinance, forbade burials in that place. It would be difficult to imagine more conclusive evidence of a refusal to accept the dedication, even if any dedication had been attempted.

Town vs. Trust Co. (Colo. Sup.), 70 Pac., 763.

Pettit vs. Mayor (Ga.), 23 S. E., 198.

But no dedication was attempted or intended, and the patent did not so operate. This is settled by an overwhelming weight of authority, and it is also well settled that a municipal corporation having acquired title under similar circumstances, is at liberty to alienate the same, and especially so under such facts as are presented in the case at bar.

In Van Ness vs. City of Washington, 4 Peters, 232, this court had under consideration the grants by the original proprietors of portions of the territory now constituting the city of Washington and the District of Columbia. It appeared that, by the contract with the original proprietors, they agreed to convey in trust to the president of the United States or commissioners or such persons as he should appoint, the title to their respective lands; that the president should have the sole power of directing the Federal City to be laid off in what manner he pleased, retaining any number of squares he might think proper for public improvements *or other public uses.* When the city was laid off the lots were to be the joint property of the trustees of the original proprietors and the moneys received for their sale to be thus divided. For the streets of the city the proprietors were to receive no compensation, but for the squares or lots taken for public buildings or other public uses the proprietors were to receive compensation at the rate of twenty-five pounds per acre. It was contended by the complainants that the lands designated by the president under the agreement as public reserves were clothed with a perpetual condition or trust that they should ever remain public reserves and could not be appropriated to any private use or changed from their original public

purposes; in other words, that a dedication had been made thereof to the public use and that they were held in trust for that purpose. Mr. Justice Story, who delivered the opinion of the court, answered these contentions in a most luminous and convincing opinion, holding that the city of Washington was at liberty to alienate portions of the property reserved by the president as public squares for public purposes. Referring to the contention that the property had been dedicated to the public use or was conveyed in trust for such public use, he says, on page 280:

> "It is not a mere gratuitous donation, from motives of generosity or public spirit. * * * * * They were to receive twenty-five pounds per acre for the public reserves. They understood themselves, then, to receive payment from the public for the reserves. It makes no difference that, by the subsequent arrangements, they were to receive this payment out of the sales of the lots, which they had agreed to convey to the public in consideration of the government's founding the city on their lands. It was still contemplated by them as a compensation, as a valuable consideration fully adequate to all their grants. It can, therefore, be treated in no other manner than as a bargain between themselves and the government for what each deemed an adequate consideration. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity and was never so treated in the negotiations of the parties."

At another place in the opinion (page 282) he says that, although the case stood solely upon said preparatory agreement:

> "Even then the appropriation of these squares for public uses would not necessarily carry with it an implied obligation that they should forever remain dedicated to those uses and to none other. If such had been the intention of the parties, we should naturally expect to find there some direct expression of it, some acknowledgement of the obligation or some condition carrying it to such a political mortmain. If the stipulation was so important and valuable as is now contended for and constituted an object of permanent solicitude, it would scarcely escape the notice of the proprietors in laying down the fundamental basis of their cessions."

Mr. Justice Story emphasizes his conclusions by a reference to deeds which were subsequently made by the proprietors in pursuance of the contract, to the trustees selected by the president, which deeds provided that said trustees should convey to commissioners appointed for that purpose, the streets and public places selected by the president "for the use of the United States forever."

These deeds correspond to the patent in the present case and the preliminary contract to the act of Congress of 1872.

Referring to the deeds, Mr. Justice Story holds that they must be construed to embody the final agreement of the parties:

> **"There is no pretense to say that the indenture has not fully carried that agreement into effect. There is no allegation in the bill of any mistake in the draft of the indenture, or that the instrument was not precisely what the parties intended it should be. * * * We must take the indenture, therefore, as we find it, as the complete execution of the preliminary agreement, and as expressing the true intent and definitive objects of the parties. The preliminary agreement then became, upon the execution of the indenture, *functus officio*, and was merged in the more formal and solemn stipulations of the latter. * * * Here we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegation of mistake, and we are to construe that instrument according to the legal import of its terms. Now, upon such legal import there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which, by law, are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land for**

> any general purpose, they are the very words which the conveyance would adopt in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument which control in any manner the natural meaning of them. There are no objects avowed upon the face of it which imply any limitation. How, then, can the court defeat the real meaning and resort to a conjectural intent?"

In Potomac Steamoat Co. vs. Upper Potomac Co., 109 U. S., 672, this court again had under consideration the same contracts and the same grants, and the reasoning and conclusions of Mr. Justice Story were reaffirmed and adopted.

The same course of reasoning was followed and similar conclusions reached under analogous facts by the Circuit Court of Appeals of the Sixth Circuit in Board of Commissioners vs. Young, 59 Fed., 96.

In Brendle vs. German Reform Church, 33 Pa. St., 415, a case approved by this court in Stuart vs. Easton (supra), it was held that a conveyance of land to trustees in trust for the use of a religious congregation for the benefit of its poor, for a place to erect a church and *for a burial ground*, vests an executed legal estate in the congregation itself, not by way of charitable use, but in absolute ownership, and the congregation may sell and alienate the same if it so desire, thereby conveying a good title.

In Beach vs. Haynes, 12 Vermont, 15, Judge Redfield held that when land was conveyed to a town by a deed reciting that it was "for the use of a common,"

there was no dedication, but the town took an unqualified fee and might convey the same; and the same ruling was made in State vs. Woodward, 23 Vermont, 92.

In Supervisors vs. Patterson, 56 Ill., 111, both in the agreement of sale and in the deed it was provided that the land was sold and conveyed "for a court house and other county buildings." It was held that these words did not operate in anywise to restrain the power of alienation by the proper county authorities, the court saying:

> "If A. buys a lot of ground from B. and it is declared in the deed that he purchased it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention."

In Pettit vs. Mayor, 95 Ga., 645; 23 S. E., 198, it is held that, even where the city itself had appropriated and set aside certain real estate, the title to which stood in the municipal corporation, for cemetery purposes, yet such appropriation did not constitute an irrevocable dedication, unless there was upon the part of the public such user thereof for that purpose that a change in use would operate as a serious injury or inconvenience to the general public.

We have already called attention to the fact that the property in controversy here was never used by any one as a cemetery, and no interments were ever made therein, and that, of the entire forty acres conveyed to Machebeuf, only a part thereof was so used,

and such use was not by the public generally, but by the members of a certain religious society.

This brings the case within the rule laid down in Ogden vs. Bear Lake Co., 16 Utah, 440; 52 Pac., 697, wherein the court, stating in apt language the well settled principle, said:

> "A city sometimes has on hand personal and real property not devoted to the use of the public. Fire engines, horses or other personal property may become unsuited to the use for which they were designed and be replaced and cease to be used. Public buildings may become unfit for the public use, and for sufficient reasons the city may not wish to build on the same lot, and such buildings and the lots upon which they stand may be no longer used by the public. The city, from time to time, may have other classes of property that has ceased to be used or is not used by the public. All such property of a municipal corporation not devoted to the public use may be sold or leased under the general authority to sell or lease as the public welfare may demand. Such property may be converted into money or other things, and in that form devoted to the use of the public."

To the same effect are:

U. S. vs. Case Library, 98 Fed., 512.
Konrad vs. Rogers, 70 Wis., 492.
Christy vs. Whitmore, 67 Iowa, 60.
Bushnell vs. Whitlock, 77 Iowa, 285.

Town of Prestonsburg vs. Floyd County, 23 Ky. Law Rep., 1157; 64 S. W., 907.

Llano County vs. Knowles, —— Texas Civil Appeals, ——; 29 S. W., 549.

Attorney General vs. Merrimac Co., 14 Gray, 586.

Town vs. Elliott, 5 Ohio St., 114.

De Varaigne vs. Fox, 2 Blatchford, 95.

Brooklyn vs. Armstrong, 45 N. Y., 234, at 243.

McGehee vs. Woodville, 59 Miss., 648.

Field vs. Providence, 17 Rhode Island, 803.

First German Church vs. Summit County Commissioners, 23 Ohio Circuit Court Reports, 553.

A number of cases are cited and quoted from in plaintiff in error's brief, supposed to sustain the contention that the property in controversy had been dedicated to the public use as a public cemetery for the inhabitants of the City of Denver and vicinity. It would serve no useful purpose to take up and criticise these cases separately. Suffice it to say that not a single case so cited supports the contention. Without an exception, the cases involved a donation and not a sale of the property, and thus were controlled by the doctrine of charitable uses. Most, if not all, of them arose upon common law dedications, which operated by way of estoppel and by which the grantee receives only an easement, the legal estate always remaining in the grantor, and consequently the grantee has nothing to convey, and in all of said cases the

intention to dedicate is expressed in unequivocal language, and the dedication had been accepted by the public and the property taken possession of and used for the purpose intended by the dedicator. The distinction between such cases and the case at bar is too clear to need further comment. Furthermore, almost without exception the cases cited were actions in equity brought by the dedicator or grantor for the purpose of controlling the use and preventing the misuser of the property. No case was such as is the one at bar, of the nature of an action in ejectment, which is to be determined upon the strict legal title.

At least one of the cases cited, and that, perhaps, the strongest of them all, was subsequently reversed. We refer to the case of Stockton vs. Newark, 42 N. J. Eq., 531, which was reversed in Newark vs. Stockton, 44 N. J. Eq., 179.

But, even if there were either a condition subsequent or a trust, the act of Congress of 1890 rendered the fulfillment of the condition unnecessary, and the action of the city council in forbidding burials in the premises in controversy rendered the performance of the trust impossible. This of itself would do away with any right of reversion, either to the city or to the United States, and would deprive either of them of any further control of the property.

Jerome vs. Railroad, 14 W. Va., 514.

Elkhart vs. Ellis, 113 Ind., 215.

Taken in connection with the deed of the city, which absolutely transferred all the interest of the city in the land in controversy, there is no escape from the conclusion that the City of Denver, as a municipal

corporation, is wholly precluded from maintaining any of the positions assumed in this litigation.

Schlessinger vs. Mallard, 70 Cal., 326.

But, if the estate were one conveyed upon condition, no one could take advantage of the violation of that condition except the United States government, and it could do so only by some affirmative act.

Van Wyck vs. Knevals, 106 U. S., 360.

Bybee vs. Oregon Co., 139 U. S., 663.

U. S. vs. Loughrey, 172 U. S., 206.

U. S. vs. Tennessee Co., 176 U. S., 242.

Northern Pacific vs. Smith, 171 U. S., 275.

2 Devlin on Deeds, section 969.

Or, if the grant be viewed as one in trust, yet the conveyance of the trustee in violation of the terms of the trust nevertheless carries the legal title. No complaint thereof can be made by any except the *cestui que trust*, and then only by an action in equity and not in a suit at law.

Williams vs. Jackson, 107 U. S., 478.

Cowell vs. Colorado Springs Co., 100 U. S., 555.

Clayton vs. Spencer, 2 Colo., 378.

Smith vs. Pipe, 3 Colo., 187, at 195.

Fillmore vs. Reithman, 6 Colo., 120.

Murray vs. Hobson, 10 Colo., 66.

Stephens vs. Clay, 17 Colo., 489.

Reid vs. Sullivan, 20 Colo., 498.

Town vs. Meyers, 16 Vermont, 408.

If there be a trust for a public purpose, the City of Denver, as a municipal corporation, was not the *cestui que trust*, but, by the contention of plaintiff in error, the inhabitants of said city and vicinity; in other words, the general public were the *cestuisque trustent*, as is invariably true in cases of dedication for a public use; but, if the city, as a municipal corporation, were the *cestui que trust*, it can not now complain, for it parted with its interest by deed.

III.

LACHES AND EQUITABLE ESTOPPEL.

But, even if there had been, at any time, cause for complaint upon the grounds stated in plaintiff in error's argument, and, even if the proper party were here complaining, still the judgment below should be affirmed for the reason that the city and its representatives were clearly estopped by their own conduct and delay from disturbing the title which had been conveyed to Machebeuf and which passed from him to his grantees, now parties to this suit.

It appears, without dispute, that as early as 1863 the forty acres were in the possession of one Walley, and the title thereto was claimed by him; that at that time it was purchased from Walley by Machebeuf for the sum of two hundred dollars ($200); that, thereupon, Machebeuf took possession of the property and maintained the possession thereof until he sold it to Morgan; that when the patent of the United States was issued to the City of Denver, neither said city nor

any one in its behalf attempted to take possession of the property, but such proceedings were had by the city council that it was determined that Machebeuf had prior rights to the property, and thereupon it was resolved to convey any rights which the City of Denver had to Machebeuf upon the payment of $1.25 an acre and the costs of obtaining the patent; that thereupon Machebeuf paid the city not less than $50.00, and probably more, and received the city's deed; that the city and its representatives stood by from February 6, 1874, the date of said deed, until September 1, 1892, when this action was begun, and, with full knowledge, permitted Machebeuf to use said premises as a private cemetery for members of the Catholic faith, permitted him, on May 2, 1887, to convey said property, or part of it, to The Colorado Catholic Loan and Trust Company, allowed its use as a private cemetery to be continued until some time in the year 1887, when interments therein ceased because of the public clamor in regard thereto, the City of Denver having extended and surrounded said tract, and subsequently and before the bringing of this action, having by ordinance forbidden such interments. The city and its representatives remained inactive while said property, by the lapse of time and the growth of said city was converted from land of comparatively little value to town lots of very great value; while, after interments had ceased, as aforesaid, Machebeuf and the Colorado Catholic Loan and Trust Company sold, for a large sum of money, to Samuel B. Morgan, that portion of the property in which no interments had been made; while the said Morgan platted the land as a part of the City of Denver, dedicating the streets and alleys

to the public and filing the plats in the county recorder's office; while the said Morgan placed said property upon the market and sold large numbers of said lots to various persons, now made defendants to this action, and not only remained inactive as aforesaid and raised no objection while all of the things above mentioned were being done, but, after the platting of said property and the dedication of the streets and alleys, for four years levied taxes thereon, to the amount of nearly $2,500, which Morgan paid, while Morgan, who had himself bought in good faith and without notice of any defect in his deed, was selling and conveying portions of the land to many others likewise buying in good faith.

We submit that the facts above recited, taken in connection with the fact that the city has never offered to return either the purchase price received by it from Machebeuf or any of the taxes arising from the assessment of the property for the purpose of taxation, make such a case of equitable estoppel and the delay of the city for a period of eighteen years to question in any way the validity of the title conveyed by its deed constitutes such laches that, even in a court of equity, relief would be denied it, and certainly it can have no such relief in a court of law, where only the legal title is considered.

The doctrine of equitable estoppel is applicable both to matters arising in suits at law as well as in equity, and the doctrine has been applied in many cases in the federal courts.

Dickerson vs. Colgrove, 100 U. S., 580.

Baker vs. Humphrey, 101 U. S., 494, at 499.

In Kirk vs. Hamilton, 102 U. S., 78, the court refers to the reason why such an estoppel is applicable to a suit in ejectment, saying that it is because such a suit involves both the right of property and the right of possession; that, as the facts show that *in equity* and good conscience the plaintiff was not entitled to disturb defendant's possession, there is no reason why the defendants might not rely on the doctrine of equitable estoppel.

So, in George vs. Tate, 102 U. S., 570, where title by estoppel is claimed and the doctrine, as to its use in suits at law, is affirmed.

See, also:

Drexell vs. Berny, 122 U. S., 253.

Miller vs. Merine, 43 Fed., 266.

DeGuire vs. St. Joseph Lead Co., 38 Fed., 65, at 66.

In Kirk vs. Hamilton (supra) a party claiming under a judicial sale was allowed to hold a title, though not a valid title, as against the real owner of the property, who stood by and allowed the purchaser to expend money on the strength of such title, the court saying:

> "He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which the others acted."

And in George vs. Tate (supra) the court says:

> "A title to real estate thus acquired is effectual either for attack or defense in an action of ejectment."

The mere act of levying taxes and assessing the lots to Morgan is enough in and of itself alone to establish an estoppel as against the city's claim that he did not own it, but that it was public property.

Dillon on Municipal Corporations (3d Ed.), section 674.

Simplot vs. Dubuque, 49 Iowa, 632.

Quincy vs. Railroad, 92 Ill., 21.

Adams County vs. Railroad, 39 Iowa, 511.

Brandirff vs. Harrison County, 50 Iowa, 164.

Smith vs. City, 80 Iowa, 85, at 89.

County vs. Am. Co., 40 Iowa, 460.

Austin vs. Bremer County, 44 Iowa, 156.

C. & N. W. vs. People, 91 Ill., 251, at 255.

Taken in connection with the other facts which appear in this case without dispute, we submit that an equitable estoppel is established beyond all question.

In U. P. R. R. Co. vs. McAlpine, 129 U. S., 314, the court says:

> "A principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him and incur expenses by reason of it, and then, upon some pretext of a defect in a matter of

> form, refuse compliance with its provisions, and thus deprive the purchaser of the benefits of his labor and expenditures."

An equitable estoppel is as available against and laches is as well imputed to a municipal corporation as to an individual. This court, in Boone County vs. The Burlington Co., 139 U. S., 684, says:

> "The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or an individual person."

And in the above case the court cites Railroad Co. vs. District of Columbia, 132 U. S., 1, 11 and 12.

See, also:

1 Dillon on Municipal Corporations (4th Ed.), section 548.

Clark vs. City of Washington, 12 Wheaton, 40.

School District vs. Goerges, 50 Mo., 194.

The rule is thus laid down by this court in Zabriskie vs. Railroad Company, 23 Howard, 381, at 400:

> "A corporation, quite as much as an individual, is held to a careful adherence to the truth in its dealings with mankind, and can not by its representations or silence involve others in onerous engagements, and then defeat the calculations and plans its own conduct has superinduced."

Several matters were assigned as error which have not been discussed in plaintiff in error's brief. Relying upon the settled rule that this court will not consider errors assigned but not discussed, we pass them by.

Home Benefit Association vs. Sargent, 142 U. S., 691, at 694.

Van Guirden vs. Va. Coal & Iron Co., 8 U. S. App., 229; 52 Fed., 838.

American Fiber Co. vs. Buckskin Fiber Co., 37 U. S. App., 742; 72 Fed., 508.

Upon the arguments advanced and the authorities cited in the foregoing pages, we submit the cause, respectfully confident that the result must be an affirmance of the judgment of the Circuit Court of Appeals.

WILLARD TELLER,
CLAYTON C. DORSEY,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 13.—October Term, 1903.

Robert R. Wright, Jr., as Mayor of the City of Denver, Plaintiff in Error, vs. Ellen Teresa Morgan et als. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[October 26, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action of ejectment brought in the Colorado State court and removed to the Circuit Court of the United States. The case was tried in the latter court and a verdict and judgment were ordered for the plaintiff on the undisputed facts. On exceptions a judgment was ordered for the defendants by the Circuit Court of Appeals, 106 Fed. Rep. 452, see 79 id. 577, and the case was brought here by writ of error. The defendants claim title under a sale by the city of Denver and a deed executed by the mayor of the city. The plaintiff contends that the act of Congress under which the original patent was granted made the land inalienable, that the patent did not give the city a legal title, that the city had no power to convey, that the alleged authority of the city to the mayor to execute the deed was insufficient, and that the deed did not follow the resolution upon which the defendants rely.

The act of Congress, approved May 21, 1872, c. 187, (17 Stat. 140,) was entitled "An act to enable the city of Denver to purchase certain lands for a cemetery," and it authorized the mayor of the city to enter, at the minimum price, certain lands, including the land in question, "to be held and used for a burial place for said city and vicinity." The price was paid and a patent was issued purporting to convey to the "mayor in trust for said city and to his successors" the said land, not referring to the above act otherwise than by the words "in conformity with the several acts of Congress in such case made and provided." This patent was confirmed by an act of Congress approved January 25, 1890, c. 3, (26 Stat. 2,) and the city of Denver was authorized "to vacate the use of the said land, or any portion thereof, as a cemetery, and to appropriate and use the same or any part thereof for a public park or grounds."

After the passage of the first act, Joseph P. Machebœuf, the Roman Catholic bishop of Denver, made a petition to the mayor and common council of Denver, representing that in 1863 he had purchased a part of the

said lands, and that the same had been and was used as a burial place, and asking for a conveyance to him and his successors in office. A committee recommended that the petition be granted, and the council voted to adopt the report. On February 6, 1874, for a stipulated price which was received, a deed was executed by the mayor in the name of the city to Machebœuf, described as bishop of Colorado, habendum to him, his heirs and assigns, "for the purposes aforesaid." The land in controversy is a part of the land embraced in this deed, and, never having been used for burial, was conveyed by Machebœuf to the defendants' predecessor in title.

On the foregoing facts it is sufficiently evident that the plaintiff has no title, and that would be enough to show that the judgment must be affirmed. The action is brought by the present mayor in his own name, not by the city. Furthermore, it also is plain enough that the city did get a title by the patent. The first act of Congress contemplated a purchase by the city, and the patent was to the mayor in trust for the city. This trust was executed by the statute of uses. The second act recites that the city has received and paid for a patent. It is argued that the words in the first act, "to be held and used for a burial place for said city and vicinity," show a trust more extensive than the city, and therefore prevent the execution of the use. But these words are not in the patent, and if they had any effect only would impose a trust upon the city, they would not prevent the operation of the habendum in the deed. It is suggested that the answer admits that the title was in the mayor until the conveyance by the city. But this is a mere conclusion of law. The answer sets up the facts in full, and it is apparent that no point was made on the pleadings below. On the contrary, it is said, and is not denied, that after a decision to that effect on demurrer, 79 Fed. Rep. 577, it was admitted by the plaintiff that the legal title vested in the city by virtue of the patent of the United States.

If the legal title was in the city it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used, it needs no argument to show that there was no condition or limitation here. *Stuart* v. *Easton*, 170 U. S. 383. Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a State, when the conveyance was absolute and was made to a citizen or instrumentality of the State; we express no opinion upon the point. It is enough that it did not purport so to restrict the ordinary incidents of title. We should require the clearest expression of such an unusual restriction before we should admit that it was imposed, especially in an ordinary sale for cash. Here the act probably meant no more than to explain the motive for a sale at the minimum price. *Board of Commissioners of Mahoning*

County v. *Young*, 59 Fed. Rep. 96. The ratified patent said nothing of any restriction or even any trust beyond the one executed in the city. Of course, however, no question of trust is before us. If the city had found it more convenient to convey the land to a cemetery corporation, there is nothing in the statutes or patent which would have prevented it. The conveyance to the bishop was essentially similar to the case supposed, except in technical form, and probably was made on grounds of justice that very possibly were considered by Congress. The Catholics had spent money on the land and had used it for a burial ground long before Congress passed the act.

If the city got a fee simple absolute, as in our opinion it did, we are not called upon to spend time on the question of its power under the laws of the State or of its action in the premises. These questions were not much argued here. The city had a general power of alienation by charter, and we are not prepared to say that the power did not extend to burying grounds. The vote to adopt the report was a sufficient vote to sell, and the question is not open whether there was any informality in the execution of the sale by the mayor rather than by a special commissioner. The supposed error would be corrected by equity if necessary. After the price had been received by the city and the land had been occupied by purchasers for nearly twenty years, the city would not now be allowed to profit by a merely technical mistake.

The objection that the deed did not follow the authority is unfounded. Giving Machebœuf a wrong title had no effect on the grant, and the habendum properly was to him and his heirs, notwithstanding the petition and the intent that the title should follow the office and not the blood of the grantee. Apart from statute the law does not recognize the bishop as a corporation sole, and therefore the land could not be limited to him and his successors. At all events, it was sufficient to give the bishop a fee by the proper words and to leave the official succession to the title to be effected by other means than the limitation in the deed. The petition of Machebœuf no doubt contemplated that he would take the land for the benefit of his church, and no doubt he did so in fact. But there was nothing which required this intention to be expressed in the deed. — The plaintiff is not concerned with the extent of Machebœuf's power to convey to secular uses.

Judgment of the Circuit Court of Appeals affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.